Supreme Court, U.S.
FILED

0 8 1 5 0 0 JUN 1 - 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

In The
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID A. BILLIONS*
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 HACKS CROSS ROAD
THIRD FLOOR, BUILDING B
MEMPHIS, TN 38125-8800
(901) 434-8533

* *Counsel of Record*

Counsel for Petitioner
Federal Express Corporation

June 1, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

If Title VII precludes the Equal Employment Opportunity Commission ("EEOC") from bringing a direct action against an employer once the employee elects to request the right-to-sue notice and files suit on the claims alleged in his charge, would it be inconsistent with Title VII to allow the EEOC to maintain perpetual jurisdiction to investigate the charge.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The Petitioner here and appellant below is Federal Express Corporation (d/b/a FedEx Express).

The Respondent here and appellee below is the EEOC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of Petitioner Federal Express Corporation (d/b/a FedEx Express) is FedEx Corporation, whose stock is publicly traded on the New York Stock Exchange under the symbol FDX.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION ... 6

I. REVIEW IS NECESSARY TO ADDRESS THE EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW THAT FLOWS FROM CONGRESS' INTENT TO PREVENT THE EEOC FROM EXERCISING UNCONSTRAINED INVESTIGATIVE JURISDICTION AND TO PRESERVE PLENARY POWER TO THE COURTS 7

II. REVIEW IS PROPER BECAUSE THE NINTH CIRCUIT'S DECISION BELOW CREATES A SPLIT AMONG THE CIRCUITS THAT EXACERBATES A

PREVIOUSLY-EXISTING SPLIT WHICH MUST NOW BE RESOLVED 12

A. The circuits are split on the issue of whether Title VII allows the EEOC to file suit once the charging party elects to request the right-to-sue and files suit on the claims alleged in his charge 15

B. The Ninth Circuit's analysis in *EEOC v. Federal Express Corp.* directly conflicts with the Fifth Circuit's decision in *Hearst* on the underlying question 17

1. The Ninth Circuit misinterpreted Title VII's enforcement procedure .. 17

2. The Ninth Circuit afforded undue deference to the EEOC's Title VII procedural regulations 20

C. Because the district courts have also reached conflicting conclusions on the underlying question, this issue is ripe for review 21

CONCLUSION 22

APPENDIX

Appendix A: Ninth Circuit Order and Amended Opinion, dated March 3, 2009 ..... 1a

Appendix B: Ninth Circuit Opinion, dated September 10, 2008 ..... 28a

Appendix C: District Court Order Granting Application for Order to Show Cause Why An Administrative Subpoena Should Not be Enforced, dated September 8, 2006 ..... 56a

Appendix D: Statutes 65a

Appendix E: Regulations 73a

Appendix F: Transcript of Show Cause Hearing-District Court, August 28, 2006 ..... 79a

Appendix G: *Derrick Satchell et al. v. FedEx Express*, Case Nos. C03-2659 SI and C03-2878 SI - Plaintiffs' Motion for Preliminary Approval of Class Settlement, April 9, 2007 ..... 118a

Appendix H: *Derrick Satchell et al. v. FedEx Express*, Case Nos. C03-2659 SI and C03-2878 SI - Order Granting Final Approval to Class Action Settlement, August 14, 2007 ..... 164a

TABLE OF AUTHORITIES

CASES

Alli v. Savitz,
No. 07-CV-10670, 2008 U.S. Dist. LEXIS 63571 (E.D. Mich. Aug. 20, 2008) 11

Alexander v. Gardner-Denver Co.,
415 U.S. 36, 94 S. Ct. 1011 (1974) 10

Butler and Flynn v. Portland General Electric Co.,
No. 88-455-FR, 1990 U.S. Dist. LEXIS 1630 (D. Or. Feb. 9, 1990) 11

EEOC v. Continental Oil Co.,
548 F.2d 884 (10th Cir. 1977) 15

EEOC v. Federal Home Loan Mortgage,
37 F. Supp. 2d 769 (E. D. Va. 1999) 21, 22

EEOC v. Harris Chernin, Inc.,
10 F.3d 1286 (7th Cir. 1993) 15

EEOC v. Hearst Corp.,
103 F.3d 462 (5th Cir. 1997) . . . . . *passim*

EEOC v. Home Depot, Inc.,
No. 01-cv-1771 W (JAH), 2001 U.S. Dist. LEXIS 26308 (S.D. Cal. Nov. 8, 2001) 22

EEOC v. Huttig Sash & Door, Co.,
511 F.2d 453 (5th Cir. 1975) 16

EEOC v. Kimberly-Clark Corp.,
511 F.2d 1352 (6th Cir. 1975), *cert. denied*,
423 U.S. 994, 96 S. Ct. 420 (1975) 16

EEOC v. Maryland Cup Corp.,
785 F.2d 471 (4th Cir. 1986) 11

EEOC v. N. Hills Passavant Hosp.,
544 F.2d 664 (3d Cir. 1976) 15, 16

EEOC v. Ocean City Police Dept.,
820 F.2d 1378 (4th Cir. 1987) *vacated on other grounds*, 486 U.S 1019, 108 S. Ct. 1990 (1988) 13

EEOC v. Pic Pac Supermarkets, Inc.,
689 F. Supp. 607 (S.D. W.Va. 1988) 16

EEOC v. Roadway Express, Inc.,
750 F.2d 40 (6th Cir. 1984) 9

EEOC v. Shell Oil Co.,
466 U.S. 54, 104 S. Ct. 1621 (1984) 8, 9

EEOC v. Sunoco, Inc.,
No. 08-MC-145, 2009 U.S. Dist. LEXIS 6070
(E.D. Pa. Jan. 27, 2009) 22

EEOC v. Von Maur, Inc.,
No. 4:07-mc-19-RAW, 2007 U.S. Dist. LEXIS
86046 (S.D. Iowa Oct. 22, 2007) 22

EEOC v. Waffle House,
543 U.S. 279 (2002) 19

Harris v. Amoco Production Co.,
768 F.2d 669 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186 (1986) 14

McDonnell Douglas Corp. v. Marshall,
465 F. Supp. 22 (E.D. Mo. 1978) 9

Occidental Life Ins. Co. of California v. EEOC,
432 U.S. 355, 97 S. Ct. 2447 (1977) 8, 12, 13, 18

Precision Prefinishing, Inc. v. Sherwin-Williams Corp., No. 89-759-FR, 1990 U.S. Dist. LEXIS 10132 (D. Or. July 27, 1990) 11

Reid v. Lockheed Martin Aeronautics Co.,
No. 1:00-CV-1182 & 1183, 2001 U.S. Dist. LEXIS 991 (N.D. Ga. Jan. 29, 2001) 14

Robinson v. Int'l Broth. Of Elec. Workers Local 134,
No. 86 C 6643, 1989 U.S. Dist. LEXIS 3539 (N.D. Ill. Apr. 5, 1989) 20

Rockwell Int'l Corp. v. H. Wolfe Iron and Metal Co., et al., 576 F. Supp. 511 (W.D. Pa. 1983) 11

Univ. of Pa. v. EEOC,
493 U.S. 182, 110 S. Ct. 577 (1990) ... 8, 18, 19

STATUTES

5 U.S.C. § 552 21
5 U.S.C. § 552(b)(3) 21
28 U.S.C. § 1254(1) 1
29 U.S.C. § 161(2) 2
42 U.S.C. § 2000e ..... *passim*
42 U.S.C. § 2000e-5(f)(1) 8, 14, 15

42 U.S.C. § 2000e-5(f)(3) 2
42 U.S.C. § 2000e-8(a) 9
42 U.S.C. § 2000e-9 2

RULES

Fed.R.Civ.P. 26(b) & (c) 10
Fed.R.Civ.P. 34 11
Fed.R.Civ.P. 34(a) 11
Sup. Ct. R. 10(a) 6
Sup. Ct. R. 10(b) 6

REGULATIONS

29 C.F.R. § 1601.28(a)(3) (2009) 20
29 C.F.R. §1610.17 (2009) 21

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 558 F.3d 842, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-27a. This opinion amended and replaced the Court of Appeals' original opinion which is reported at 543 F.3d 531, 2008 U.S. App. LEXIS 19242, and is reprinted at Pet. App. 28a-55a. The District Court's opinion is not reported, but is reprinted at Pet. App. 56a-64a.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its amended opinion on March 3, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The pertinent provisions are reproduced at Pet. App. 65a-72a.

STATEMENT OF THE CASE

This case represents a marked expansion of the investigatory jurisdiction of the EEOC beyond anything contemplated in the statutory framework or any court precedent to date. If left standing, the Ninth Circuit's interpretation of the EEOC's investigatory jurisdiction as never-ending will usurp Congress' intended role of the courts as the enforcer of Title VII.

District Court Jurisdiction. The court of first instance, the United States District Court for the

District of Arizona, had jurisdiction of this matter pursuant to 42 U.S.C. § 2000e-5(f)(3), 42 U.S.C. § 2000e-9, and 29 U.S.C. § 161(2).

Factual Background. On November 27, 2004, Tyrone Merritt ("Merritt") filed a charge of discrimination with the EEOC against Federal Express Corporation ("FedEx") on behalf of himself and similarly-situated African American and Latino employees in FedEx's fourteen-state Western Region.[1] R.11, Ex.1. Merritt alleged he was discriminated against on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. claiming he was denied promotions; issued harsher discipline than similarly-situated Caucasian employees; denied fair compensation and leave without pay; and subjected to an unfair cognitive ability test, the Basic Skills Test ("BST"), previously required for promotion to some positions at FedEx. R.11, Ex.1. After failing the BST a second time, Merritt filed a supplemental charge on June 29, 2005 reasserting and updating the BST and promotion claims on behalf of himself and similarly-situated employees in FedEx's Western Region. R.11, Ex.2.

The filing of this supplemental charge triggered an investigation by the EEOC. On July 8, 2005, the EEOC requested by letter that FedEx produce information related to the BST. FedEx fully complied with this request. R.11, Ex.'s 7-10.

---

[1] Citations to record evidence refer to the docket number in the district court record.

Approximately three months later, Merritt, through counsel, requested a right-to-sue notice from the EEOC, which the EEOC issued to him on October 20, 2005. The right-to-sue notice indicated that more than 180 days had expired since the filing of the initial charge; notified Merritt of the 90 day time period to file suit; and stated the EEOC would "continue to process the charge." R.11, Ex.3.

On October 12, 2005, shortly before receiving the notice, Merritt joined as a representative plaintiff in a class action lawsuit pending in the United States District Court for the Northern District of California styled *Derrick Satchell et al. v. FedEx Express*, Case Nos. C03-2659 SI and C03-2878 SI ("*Satchell*"). R.11, Ex.5. This litigation encompassed claims and classes that were identical -- both geographically and temporally -- to those alleged by Merritt in his initial and supplemental charges. The court had previously certified classes on each of the alleged claims. R.11, Ex.5.

Nearly four months after Merritt joined the *Satchell* litigation as a class representative and while discovery continued in *Satchell* under the supervision of the court and pursuant to the *Federal Rules of Civil Procedure*, the EEOC revived its administrative investigation of Merritt's charges by serving FedEx with a subpoena *duces tecum* on February 10, 2006. R.2, Ex.A (Attachment 5). The subpoena sought identification of all computerized or machine-readable personnel databases maintained by the company since January 1, 2003. FedEx objected to the request and filed a timely petition with the EEOC to revoke or modify the subpoena, which the EEOC denied.

Lower Court Proceedings. The EEOC then filed an action to enforce the subpoena in the United States District Court for the District of Arizona. FedEx opposed this action asserting: (1) the EEOC's jurisdiction to investigate the charge ended when Merritt received a right-to-sue letter and joined the *Satchell* matter as a class representative, and (2) the information sought by the subpoena was irrelevant, overbroad, and unduly burdensome. After briefing and argument, the District Court granted the EEOC's application and ordered FedEx to comply with the subpoena, reasoning, in part, that even though Merritt had filed suit on his claims and was pursuing complete relief in the court system, the EEOC did not "plainly lack jurisdiction" to continue its investigation. R.14, p.6. FedEx timely appealed the District Court's decision to the Ninth Circuit.

While the appeal in the Ninth Circuit was still pending, Merritt, for himself and as a *Satchell* class representative, completed extensive discovery, motion practice and trial preparation, and ultimately entered into agreements to settle all individual and class claims that had been raised in his charge. *See* Pet. App. at 118a-163a. The *Satchell* court approved a Consent Decree memorializing the settlement of the class claims on September 14, 2007, and on July 16, 2008, the individual non-class claims were dismissed with prejudice pursuant to individual settlement agreements. *See* Pet App. at 164a-168a. As a result, all allegations raised by Merritt in his initial and supplemental charges, including his individual claims and the class claims covering similarly-situated employees in FedEx's Western Region, were fully resolved in the *Satchell* litigation.

On September 10, 2008, the Ninth Circuit issued an opinion affirming the District Court's ruling on the subpoena enforcement action, concluding that the EEOC maintains jurisdiction under Title VII to continue or revive the investigation of a charge even after the charging party requests a right-to-sue notice and elects to litigate all individual and class claims raised in the charge. *EEOC v. Federal Express Corp.*, 543 F.3d 531, 2008 U.S. App. LEXIS 19242, at *18 (9th Cir. Sept. 10, 2008).

The Ninth Circuit's opinion disregards the Fifth Circuit's analysis in *EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). The Fifth Circuit held that under Title VII's sequential multistep enforcement procedure, the purpose of the administrative phase is no longer served, and thus the EEOC no longer retains jurisdiction to continue the investigation, once the charging party elects to enforce his claims in court. *Id.* at 468-70. The Ninth Circuit, however, declined to afford any meaning to Title VII's carefully crafted and logically sequenced enforcement steps, concluding instead that the EEOC has continuing jurisdiction to investigate a charge during any stage of Title VII's multistep enforcement procedure, notwithstanding the charging party's election to pursue (and achieve) court resolution of the exact individual and class claims raised in the EEOC charge and without consideration that the investigation would serve no purpose given that Title VII precludes the EEOC from bringing a subsequent direct action. *Federal Express Corp.*, 2008 U.S. App. LEXIS 19242, at *18-31.

FedEx timely petitioned for rehearing or rehearing en banc, but the Ninth Circuit denied that request and

instead issued an amended opinion on March 3, 2009.[2] *See EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009).

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has never been decided by this Court, *see* S. Ct. R. 10(b), and on which the Circuit Courts of Appeal are in conflict, *see* S. Ct. R. 10(a): If Title VII precludes the EEOC from bringing a direct action against an employer once the employee elects to request the right-to-sue and files suit on the claims alleged in his charge, would it be inconsistent with Title VII to allow the EEOC to maintain perpetual jurisdiction to investigate the charge? The answer is of paramount importance to fairly reconcile Title VII's administrative goals and the powers necessary for the EEOC to achieve those goals with the limitations logically implicated when the charging party elects to litigate and resolve his claims under the supervision of the courts and pursuant to the *Federal Rules of Civil Procedure*.

The decision below expands the EEOC's powers beyond anything contemplated within the statutory framework of Title VII and creates a split among the circuits which requires resolution of a previously-existing split on a related question. The question presented contains two issues and requires resolution

---

[2] In amending the opinion, the court altered its initial analysis of the mootness issue which FedEx does not challenge in this Petition. Nor does FedEx directly challenge the court's determination of issues pertaining to the relevance and overbreadth of the subpoena requests.

of a multi-layered split among the circuits. As to the first issue of whether Title VII allows the EEOC to file a direct action once the charging party elects to litigate the claims alleged in his charge, the Seventh and Tenth Circuits have said the EEOC is limited to intervening in the charging party's lawsuit; the Third Circuit has said the EEOC may bring a separate direct action against the employer; and the Fifth and Sixth Circuits have said the EEOC may bring a separate action if the charging party's lawsuit does not incorporate all claims raised in the charge. This conflict should be resolved to provide the proper context for resolution of the precise question decided in the case below.

As to the second and underlying issue of whether Title VII allows the EEOC to maintain perpetual jurisdiction to investigate a charge after the charging party has elected to request the right-to-sue and files suit, the Fifth Circuit said there is no statutorily-sanctioned purpose while the Ninth Circuit in the case below held there are no limits on the EEOC's investigative jurisdiction.

I. REVIEW IS NECESSARY TO ADDRESS THE EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW THAT FLOWS FROM CONGRESS' INTENT TO PREVENT THE EEOC FROM EXERCISING UNCONSTRAINED INVESTIGATIVE JURISDICTION AND TO PRESERVE PLENARY POWER TO THE COURTS.

Congress deliberately divided the enforcement provisions of Title VII into four distinct stages: filing

and notice of charge, investigation, conference and conciliation, and enforcement. *See Occidental Life Ins. Co. of California v. EEOC* , 432 U.S. 355, 359, 97 S. Ct. 2447 (1977). In doing so, Congress did not provide the EEOC with limitless authority to investigate all claims of discrimination but restricted its ability to investigate to only those allegations presented in a sworn charge. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 190, 110 S. Ct. 577 (1990) ("The Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination."). Indeed, this Court has long recognized that Congress sought to "prevent the Commission from exercising unconstrained investigative authority... ." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65, 104 S. Ct. 1621 (1984).

In direct conflict with this admonition and the Fifth Circuit's holding in *Hearst*, the Ninth Circuit in this case misinterpreted Title VII to permit the EEOC to revive an investigation of a charge even though the charging party filed suit against the employer and resolved all individual and class claims through a court-approved and monitored consent decree. *See Federal Express Corp.*, 558 F.3d at 851-54. The Ninth Circuit's holding means that once an employee files a charge of discrimination, the employer always remains subject to investigation of that charge even if the EEOC intervenes in the charging party's lawsuit (*see* 42 U.S.C. §2000e-5(f)(1)), and even after the employer remedies the alleged discrimination and resolves all individual and class claims alleged by the employee in his charge.

This conclusion runs directly contrary to Congress' conscious decision not to invest the EEOC with plenary power to enforce claims under Title VII. The

EEOC's investigatory authority is limited when compared with the plenary powers of other federal agencies such as the Office of Federal Contract Compliance Programs ("OFCCP"). The OFCCP's investigative authority need not be triggered by any specific charge of discriminatory employment practice against a contractor, but it has *ongoing* power to investigate or to initiate investigation of any government contractor or subcontractor. *See McDonnell Douglas Corp. v. Marshall*, 465 F. Supp. 22, 25 (E.D. Mo. 1978). By contrast, the EEOC's jurisdiction to investigate can only be triggered by the filing of a sworn charge of discrimination. *Shell Oil Co.*, 466 U.S. at 64 (citing 42 U.S.C. § 2000e-8(a)).

Although the EEOC does not possess plenary powers and may only conduct an investigation pursuant to a sworn charge, courts have granted it broad and virtually unrestricted power to obtain any evidence that "*might cast light* on the allegations against the employer." *Shell Oil Co.*, 466 U.S. at 68-69 (emphasis added). In fact, courts allow the EEOC to subpoena evidence concerning employment practices beyond those specifically challenged in the charge. *EEOC v. Roadway Express, Inc.*, 750 F.2d 40, 43 (6th Cir. 1984). Coupling this broad authority to obtain virtually any information related to a company's employment practices with the Ninth Circuit's decision to permit the EEOC to indefinitely retain jurisdiction to revive or continue the investigation of a charge, effectively gives the Commission the very plenary powers Congress deliberately withheld from it in passing Title VII.

Congress invested the courts, rather than the EEOC, with plenary power to enforce Title VII claims.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36; 94 S. Ct. 1011 (1974), this Court explained:

> Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. ... Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.

Id. at 44-45 (citations omitted).

Courts must supervise and administer Title VII claims under the discovery procedures mandated by the *Federal Rules of Civil Procedure*. *See Fed.R.Civ.P.* 26(b)&(c) (defining scope and limits of discovery and giving court discretion under the rules to control discovery process). The Ninth Circuit's ruling however allows the EEOC to sidestep these requirements. If, as the Ninth Circuit concludes, the EEOC may conduct an investigation of a charge during *any* stage of Title VII's multistep enforcement procedure (*see Federal Express Corp.*, 558 F.3d at 851-52), even in the instance where the Commission intervenes in the charging party's pending lawsuit against the employer, the EEOC is not bound by the discovery standards imposed by the *Federal Rules of Civil Procedure* because it still has broad investigatory power to seek

access to any evidence that might cast light on the employer's personnel practices.

For example, a court would not compel an employer to create documents in response to discovery requests propounded under *Fed.R.Civ.P. 34(a). See Rockwell Int'l Corp. v. H. Wolfe Iron and Metal Co., et al.*, 576 F. Supp. 511, 513 (W.D. Pa. 1983); *Alli v. Savitz*, No. 07-CV-10670, 2008 U.S. Dist. LEXIS 63571, at *4 (E.D. Mich. Aug. 20, 2008); *Precision Prefinishing, Inc. v. Sherwin-Williams Corp.*, No. 89-759-FR, 1990 U.S. Dist. LEXIS 10132, at *3 (D. Or. July 27, 1990). Neither would a court require an employer to produce documents at a particular location or to organize responsive documents for production in a format other than as they are maintained in the ordinary course of business. *Butler and Flynn v. Portland General Electric Co.*, No. 88-455-FR, 1990 U.S. Dist. LEXIS 1630, at *5-6 (D. Or. Feb. 9, 1990). The EEOC's subpoena-enforcement power, however, is more broadly-construed than the discovery license provided to litigants under *Fed.R.Civ.P. 34* and has been interpreted to require employers to create documents, organize materials or information into a particular format, and provide the documents to the EEOC at its specified location. *See e.g., EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477-79 (4th Cir. 1986).

Unless this Court reviews and reverses the Ninth Circuit's opinion in the case below, the EEOC will be able to disrupt the orderly litigation of employment claims by declining the opportunity to intervene, ostensibly remaining on the sidelines of a lawsuit brought against the employer by the charging party, until the charging party (or the EEOC) disagrees with the court's ruling on a discovery dispute, which the

EEOC can then circumvent by issuing an investigatory subpoena that would not be subject to the same standards and limitations as the challenged discovery request. This ignores Congress' mandate that the courts, and not the EEOC, are exclusively empowered to supervise the resolution of Title VII claims once those claims are the subject of a lawsuit.

II. REVIEW IS PROPER BECAUSE THE NINTH CIRCUIT'S DECISION BELOW CREATES A SPLIT AMONG THE CIRCUITS THAT EXACERBATES A PREVIOUSLY-EXISTING SPLIT WHICH MUST NOW BE RESOLVED.

In *Hearst*, the Fifth Circuit correctly concluded that the EEOC loses its jurisdiction to investigate a charge once the charging party receives a right-to-sue notice and elects to circumvent the administrative process by enforcing his claims in court. As support for this conclusion, the *Hearst* court first recognized that Congress deliberately divided the enforcement provisions of Title VII into four distinct and sequential stages: filing and notice of charge, investigation, conference and conciliation, and enforcement. *Hearst*, 103 F.3d at 468 (referring to *Occidental Life Ins. Co.*, 432 U.S. at 359).[3] The purposes of the investigatory

---

[3] The Ninth Circuit in this case wrongly concluded that *Hearst* conflicts with this Court's holding in *Occidental Life Ins.* which did not address the issue at bar (unrestricted authority of EEOC to investigate after litigation commences) but rather a more narrowly defined issue: the EEOC's ability to bring *its own* enforcement action after conclusion of the investigatory and conciliation stages. *Occidental Life Ins Co.*, 432 U.S. at 406. Unlike *Hearst*, the charging party in *Occidental* did not file suit

stage are to determine whether "reasonable cause" supports the claims, *Occidental Life Ins. Co.*, 432 U.S. at 359, and to prepare the EEOC for action against the employer or to drop the matter entirely if the Commission finds the charge to be unfounded. *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1380 (4th Cir. 1987) *vacated on other grounds*, 486 U.S 1019, 108 S. Ct. 1990 (1988).

Because Congress granted the EEOC investigative authority for the purpose of enabling it to promptly and effectively determine whether Title VII has been violated and to assist the agency in its efforts to resolve disputes through informal conciliation, the *Hearst* court correctly reasoned these purposes are no longer served once the charging party bypasses these phases and commences formal litigation. *Hearst*, 103 F.3d at 469. The objective of the investigatory phase -- to establish whether reasonable cause supports enforcement of the charge -- is no longer necessary once the charging party requests a right-to-sue notice and files suit, particularly when, as in this case, the

---

but instead relied on the EEOC to enforce his claims. *Id.* at 357-58. When the EEOC filed its lawsuit nearly five months after the failure of conciliation efforts, the employer objected arguing that Title VII imposed a time limitation on the EEOC's power to file an enforcement action. This Court disagreed finding the Act imposed no such limitation. This Court did not decide or even address whether the EEOC has the power to investigate a charge after the charging party files suit, a difference fully noted and explained by the court in *Hearst*. *See Hearst*, 103 F.3d at 469 ("The case before us is not controlled by *Occidental*. We do not decide what independent enforcement authority remains with the EEOC now that the private parties have initiated their own enforcement proceedings. We conclude only that the time for *investigation* has passed.").

charging party's lawsuit covers all individual and class claims alleged in his charge.

Even though Title VII divests the EEOC of jurisdiction to investigate once the charging party files suit, the agency is not precluded from challenging the employer's personnel practices through other means. The *Hearst* court recognized that if the EEOC has any further interest in the charge, it may intervene in the charging party's lawsuit and pursue discovery through the courts.[4] *Hearst*, 103 F.3d at 469 & 470. *Hearst* also recognized that if the EEOC's interests extend beyond the charge (and charging party's subsequent lawsuit), it may file a Commissioner's charge or seek the same information pursuant to a different individual charge. *Id.*

---

[4] To intervene, Title VII requires only that the EEOC certify that the charging party's case is of "general public importance." 42 U.S.C. §2000e-5(f)(1). Where the charge alleges systemic pattern and practice discrimination, such as the one filed in this case, the certification need only reference the class allegations presented on the face of the charge. *See Harris v. Amoco Production Co.*, 768 F.2d 669, 677 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186 (1986) ("[u]pon concluding that a private Title VII suit is important, the Commission need only say so to intervene."); *Reid v. Lockheed Martin Aeronautics Co.*, No. 1:00-CV-1182 & 1183, 2001 U.S. Dist. LEXIS 991, at *7 n.4 (N.D. Ga. Jan. 29, 2001) (although certification was conclusory, court deferred to EEOC's determination).

A. The circuits are split on the issue of whether Title VII allows the EEOC to file suit once the charging party elects to request the right-to-sue and files suit on the claims alleged in his charge.

Because the EEOC must find reasonable cause and attempt conciliation before it can file a direct action against an employer (as opposed to intervening in a charging party's lawsuit), the EEOC has argued that it must forever retain jurisdiction to investigate in order to preserve the option to file a direct action against the employer should it become so inclined. The circuits, however, are in conflict as to whether Title VII precludes the EEOC from filing a direct action against the employer based on the allegations raised in the employee's charge once the charging party files suit. The Seventh and Tenth Circuits adhere to the view that once the private litigant brings suit, the EEOC is barred from filing suit on the private litigant's charges. The EEOC may only intervene at that point. *See EEOC v. Continental Oil Co.*, 548 F.2d 884, 889-90 (10th Cir. 1977) (finding that a construction of 2000e-5(f)(1) authorizing separate actions would render inconsequential both the provision for permissive intervention, and the requirement of a certificate of general public importance); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) (adopting reasoning of *Continental Oil*). The Third Circuit holds the opposite view that the EEOC's right to bring a direct action against the employer is in no way affected by the issuance of a right-to-sue letter or the actions of the charging party. *See EEOC v. N. Hills Passavant*

Hosp., 544 F.2d 664, 667-72 (3d Cir. 1976).[5] The Fifth and Sixth Circuits take a middle view starting from the general position that the EEOC is precluded from bringing suit once litigation of the charge is commenced by the private party, but making an exception where the scope of the EEOC's investigation of the individual's charge unearths violations not comprehended within the individual's suit. *See EEOC v. Huttig Sash & Door, Co.*, 511 F.2d 453, 454-56 (5th Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1362-63 (6th Cir. 1975), *cert. denied*, 423 U.S. 994, 96 S. Ct. 420 (1975).

Resolution of this split of authority among the circuits is essential to determining the precise question in this case because if, once the charging party files suit, the EEOC may only intervene, then no statutorily-sanctioned reason exists to allow the agency to continue the investigation when all individual and class allegations presented in the employee's charge are included in the employee's lawsuit.

---

[5] The Third Circuit was disinclined to limit the EEOC to intervention in part because the charging party's lawsuit had been dismissed as time-barred leaving no lawsuit into which the EEOC could intervene and also because the filing of a direct action by the EEOC had been a prerequisite to the EEOC's participation in settlement discussions between the charging party and the employer. *See EEOC v. Pic Pac Supermarkets, Inc.*, 689 F. Supp. 607, 610 (S.D. W.Va. 1988). Whether the charging party's lawsuit should have been dismissed as time-barred was questionable but was not before the Third Circuit.

B. The Ninth Circuit's analysis in *EEOC v. Federal Express Corp.* directly conflicts with the Fifth Circuit's decision in *Hearst* on the underlying question.

On the underlying question of whether the EEOC may continue or revive the investigation of a charge after the charging party elects to request the right-to-sue and files suit, the Ninth Circuit reached precisely the opposite conclusion of *Hearst*. *See EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009).

1. The Ninth Circuit misinterpreted Title VII's enforcement procedure.

The court first disagreed with *Hearst's* analysis of Title VII's multistep enforcement procedure concluding that the steps are not distinct or sequential, and that simply because "one stage of the enforcement procedure is going on does not mean that another stage has ceased." *Federal Express Corp.*, 558 F.3d at 851. According to the court, Title VII confers upon the EEOC investigatory authority during *each* stage of the process – meaning the agency has the power to investigate a charge before, during or even after conciliation or formal enforcement of the claims in court. *Id.* at 852.

This conclusion turns Title VII's multistage statutory scheme on its head and, if allowed to stand, will deprive the courts of the exclusive jurisdiction Congress invested in them to enforce Title VII. Under the Ninth Circuit's reasoning, the EEOC would have jurisdiction to obtain information from the employer by administrative subpoena even after the charging party files suit, the EEOC intervenes, and a court denies

discovery of the same information under the *Federal Rules of Civil Procedure*. As discussed more fully *supra*, to enforce the EEOC's administrative subpoena, the court must find only that the information sought might be relevant to the employer's personnel practices. As a result, the EEOC, during the course of a direct action against the employer, may obtain information via subpoena even after a court denies discovery of the same information under the *Federal Rules of Civil Procedure*.

At oral argument before the District Court in this case, the EEOC candidly acknowledged that it elected not to intervene in the *Satchell* litigation because the agency could obtain more information through an investigative subpoena than "once [the EEOC] is under the federal laws of discovery." Pet. App. at 112a. This result not only unfairly subjects the employer to dual proceedings on the same claims and the potential obligation to comply with discovery demands beyond the limitations imposed by the *Federal Rules of Civil Procedure*, but more importantly, circumvents the sequential enforcement plan established by Congress and affirmed by this Court in *Occidental*. *See Occidental Life Ins. Co.*, 432 U.S. at 359.

This central issue -- whether the separate stages of the enforcement process are distinct and must be completed sequentially -- is ripe for review because the courts are in disagreement. As noted, the Fifth Circuit in *Hearst* interpreted this Court's reasoning in *Occidental Life Ins. Co.* as requiring a completion of each sequential stage before the EEOC may proceed to the next step, while the Ninth Circuit relied on a statement from this Court's decision in *Univ. of Pa. v. EEOC*, 493 U.S. 182, 110 S. Ct. 577 (1990) for the

opposite conclusion, allowing the EEOC to conduct or revive an investigation during *each* stage of the enforcement process. *See Federal Express Corp.*, 558 F.3d at 851-52.

The Ninth Circuit's reliance on a single quote from *Univ. of Pa.* was misplaced because that case did not address the issue at bar, but instead considered the scope of the EEOC's authority to acquire relevant evidence as part of its administrative investigation of a charge. In that context, this Court noted that the Commission is given broad authority to obtain relevant evidence during the investigatory phase for the purpose of enabling it to make informed decisions at each *subsequent* stage of the enforcement process. *Univ. of Pa.*, 493 U.S. at 191. This phrase does not, however, confer authority on the EEOC to conduct a charge investigation *while* the parties are engaged in other phases of the multistep procedure, such as judicial enforcement.[6]

This fundamental question of statutory construction, which is necessary to a determination of the issue before the Court, and which the circuits have viewed differently, is ripe for review and should be settled.

---

[6] The Ninth Circuit's reliance on this Court's ruling in *EEOC v. Waffle House*, 543 U.S. 279; 122 S. Ct. 754 (2002) is similarly misplaced because the question decided there concerned the impact on the EEOC of a charging party's action (agreement to arbitrate) which was not contemplated or specifically provided for by Congress in Title VII. The question presented here concerns the impact on the EEOC when a charging party elects the option specifically provided in Title VII to request the right-to-sue and litigate all individual and class claims raised in his charge.

2. The Ninth Circuit afforded undue deference to the EEOC's Title VII procedural regulations.

The Ninth Circuit criticized *Hearst* for not addressing 29 C.F.R. §1601.28(a)(3) which provides in pertinent part:

> Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless [the EEOC representative] determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge...

29 C.F.R. § 1601.28(a)(3) (2009). The absence of this regulation from *Hearst's* analysis is not surprising because the regulation's self-limiting language -- the Commission may continue to *process* the charge *after issuance of the right-to-sue notice* -- is inapposite to determining whether the EEOC may also continue to *investigate* a charge *after the charging party files suit.*[7] As demonstrated, *Hearst* found no textual support in Title VII to grant the EEOC such an expansion of power. Continued inconsistent application of the law on this point will persist unless this Court reviews and decides this issue.[8]

---

[7] *See Robinson v. Int'l Broth. Of Elec. Workers Local 134*, No. 86 C 6643, 1989 U.S. Dist. LEXIS 3539, at *10 (N.D. Ill. Apr. 5, 1989)(finding 1601.28(a)(3) only empowers EEOC to issue a *second* right-to-sue notice to "further process" the charge).

[8] The Ninth Circuit's undue deference to the EEOC's interpretation of its regulation allows the EEOC to circumvent the

C. Because the district courts have also reached conflicting conclusions on the underlying question, this issue is ripe for review.

Review of this question is necessary because, like the Circuit Courts, district courts across the country have arrived at conflicting results. In facts similar to this case, the court in *EEOC v. Federal Home Loan Mortgage*, 37 F. Supp. 2d 769 (E. D. Va. 1999) embraced the reasoning of *Hearst* holding that the EEOC loses the power to investigate after the employee receives a right-to-sue letter and files a class action based on the pattern and practice claims asserted in the charge. *Id.* at 770-72. In denying the EEOC's attempt to continue the investigation into the defendant's nationwide policies and procedures, the court explained:

> [the EEOC] may not use its investigative powers in this suit at this time because those powers have expired. Were the rule otherwise, there would be significant potential for the disruption of the statutory scheme devised by Congress to redress discrimination in the workplace through both litigation and non-litigation solutions. Consider, for example, the disruption that might be caused by the issuance

---

requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. If the EEOC can perpetually maintain an open investigation or can at any time declare an investigation re-opened to effectuate the purpose of Title VII, the EEOC may never have to disclose information to a charged employer in response to a FOIA request. *See* 29 C.F.R. §1610.17 (2009); 5 U.S.C. § 552(b)(3).

> of investigative subpoenas amidst an ongoing conciliation process.

Id. at 774.

The Southern District of California reached the same result in *EEOC v. Home Depot, Inc.*, No. 01-cv-1771 W (JAH), 2001 U.S. Dist. LEXIS 26308 (S.D. Cal. Nov. 8, 2001) finding the EEOC loses jurisdiction to investigate once the charging party files suit.

In contrast, the court in *EEOC v. Von Maur, Inc.*, No. 4:07-mc-19-RAW, 2007 U.S. Dist. LEXIS 86046 (S.D. Iowa Oct. 22, 2007) held the Commission has authority to continue investigating a charge after the charging party intervenes in the EEOC's class action against employer; and similarly, in *EEOC v. Sunoco, Inc.*, No. 08-MC-145, 2009 U.S. Dist. LEXIS 6070 (E.D. Pa. Jan. 27, 2009), the Eastern District of Pennsylvania determined the EEOC retains authority to enforce a subpoena after the charging party receives a right-to-sue notice and files suit especially if the right-to-sue indicates the EEOC intends to continue to process the claims raised in the charge. As evidenced by these conflicting decisions, guidance from this Court is necessary on this important issue.

CONCLUSION

This Court should grant certiorari review to resolve the important question of whether Title VII allows the EEOC to retain perpetual jurisdiction to investigate a charge even after the charging party has elected to litigate and the EEOC has foregone the opportunity to intervene. The answer will resolve the multi-layered conflict among the circuits and give guidance to the

district courts, several of which have also reached inconsistent conclusions. The unprecedented expansion of the EEOC's investigatory jurisdiction provided by the Ninth Circuit's opinion below was neither contemplated nor sanctioned by Congress and should be reviewed and reversed.

Respectfully Submitted,

David A. Billions*
Federal Express Corporation
Legal Department, Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8533

**Counsel of Record*

Counsel for Petitioner
Federal Express Corporation

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-16864
D.C. No. CV 06-0276 RCC

[Amended March 3, 2009]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellee*,	)
v.	)
FEDERAL EXPRESS CORPORATION, *Defendant-Appellant*.	)

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted
June 13, 2008—San Francisco, California

Filed September 10, 2008
Amended March 3, 2009

Before: A. Wallace Tashima, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Tashima

COUNSEL

Frederick L. Douglas, Memphis, Tennessee, for the defendant-appellant.

Susan R. Oxford (Anne Noel Occhialino on the brief), Equal Employment Opportunity Commission, Washington, DC, for the plaintiff-appellee.

Laura Ann Giantris, McGuiness Norris & Williams, Washington, DC, for *amici curiae* The Chamber of Commerce of the United States of America, and Equal Employment Advisory Council.

ORDER

The opinion filed September 10, 2008, and reported at 543 F.3d 531, is withdrawn and replaced by the Amended Opinion filed concurrently with this order. With the filing of the Amended Opinion, Judges McKeown and Gould vote to deny the petition for rehearing en banc and Judge Tashima so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for rehearing en banc is denied. No further petition for panel rehearing or rehearing en banc will be entertained.

OPINION

TASHIMA, Circuit Judge:

We consider three issues pertaining to Federal Express Corporation's ("FedEx") refusal to comply with an administrative subpoena issued by the Equal Employment Opportunity Commission ("EEOC" or "Commission"). First, we consider whether FedEx's compliance with an administrative subpoena in another case, which resulted in FedEx providing the EEOC with the same information that the EEOC seeks to compel in this case, moots this appeal. We hold that it does not. Second, we consider, as a matter of first impression, whether the EEOC retains the authority to issue an administrative subpoena against an employer after a charging party has been issued a right-to-sue notice and instituted a private action. We hold that the EEOC does. Third and finally, we consider whether the EEOC subpoena in this case, which does not seek direct evidence of discrimination, but instead, seeks general employment files in order to help the EEOC draft future information requests, seeks evidence "relevant" to a charge of systemic discrimination. We hold that it does. In light of these holdings, we affirm the district court's decision to enforce the administrative subpoena.

JURISDICTION

The district court had jurisdiction to determine the enforceability of an administrative subpoena pursuant to §§ 706(b) and 710 of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(b) (requiring the EEOC to investigate charges of discrimination); *id.* § 2000e-9 (granting to the EEOC the investigatory and subpoena

powers of the National Labor Relations Board ("NLRB") by incorporating 29 U.S.C. § 161, which provides that the district courts have jurisdiction to determine the enforceability of an administrative subpoena). We have jurisdiction pursuant to 28 U.S.C. § 1291 because "an order of a District Court enforcing an administrative subpoena is final and ripe for review." *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 445 (9th Cir. 1988).

BACKGROUND

On November 27, 2004, Tyrone Merritt filed a charge of discrimination with the EEOC against FedEx on behalf of himself and similarly situated African American and Latino employees. Merritt alleged that FedEx's Basic Skills Test, a cognitive ability test which Merritt was required to pass to be eligible for a promotion, had a statistically significant adverse impact on African American and Latino employees. Merritt also alleged that he had been personally denied promotion opportunities, unfairly disciplined, and denied compensation on account of his race.

Merritt, through counsel, requested a right-to-sue notice from the EEOC, which the EEOC issued to him on October 20, 2005. The EEOC, however, stated in that notice that it would continue to process Merritt's charge. On October 26, 2005, Merritt joined an already-pending class action against FedEx. *See Satchell v. Fed. Express*, No. 3:03-cv-0259 (N.D. Cal.). The *Satchell* action is limited geographically to FedEx's Western Region, an area encompassing eleven western states. FedEx employees outside that region are ineligible to join that action.

Pursuant to its continuing investigation, the EEOC issued an administrative subpoena to FedEx on February 10, 2006. The subpoena directed FedEx to identify basic information about the computer files that it maintains. The purpose of the information request was to aid the EEOC in fashioning a more detailed request if the need for more information should arise later in the investigation. The EEOC did not request any specific information about specific employees, nor did it request any employee files. The subpoena requested, in relevant part:

> Please identify any computerized or machine-readable files that are or have been maintained by you (or any other under contractual or other arrangement) since January 1, 2003 which contain data on personnel activities. This type of file would include, but not be limited to applicants, hiring, promotions, testing, discipline, job analyses and evaluations, performance evaluations, demotions, employment history, amounts of pay, adjustments to pay, work assignment, adjustments to work assignments, training, transfers, terminations, job status, and so forth.

FedEx refused to comply, filing a Petition to Revoke the Subpoena with the EEOC. The EEOC denied that petition. The EEOC then filed an action in district court to enforce its subpoena. FedEx argued that the EEOC is divested of investigatory authority once the party alleging the discriminatory practice initiates (or in this case joins) a private action. The district court rejected FedEx's argument and granted the EEOC's application to enforce the subpoena. Reasoning that "[t]he breadth of power granted the EEOC to

investigate discrimination charges is such that validity of an administrative subpoena is not weakened unless the EEOC 'plainly lack[s]' jurisdiction," the district court concluded that there were "no defects in jurisdiction," and that "the evidence requested is relevant and material to the investigation." FedEx timely appealed.

Subsequently, FedEx filed a Notice of Mootness and Request for Dismissal of the appeal. FedEx represented that it had complied with an administrative subpoena relating to a charge filed by a different employee that is identical in every respect to the subpoena issued in this case, *i.e.*, it requested the same information as the Merritt subpoena. The EEOC opposes FedEx's request.[1]

STANDARD OF REVIEW

The district court's order enforcing the EEOC's administrative subpoena is reviewed *de novo*. *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 443 (9th Cir. 1994); *see also In re Estate of Covington*, 450 F.3d 917, 919 n.4 (9th Cir. 2006).

ANALYSIS

I. Mootness

As a threshold matter, we consider FedEx's motion to dismiss this appeal on mootness grounds and conclude that this appeal is not moot. FedEx argues

---

[1] We postponed consideration of the mootness issue so that it could be considered together with our determination of the merits.

that the appeal is moot because it has fully complied with a subpoena in another proceeding, producing information to the EEOC that is "identical to the Merritt subpoena in every respect." Because of this production, FedEx argues further, "the EEOC now possesses all information sought by the Merritt subpoena."

[1] "A case is moot if the issues presented are no longer live and there fails to be a 'case or controversy' under Article III of the Constitution." *Pilate v. Burrell (In re Burrell)*, 415 F.3d 994, 998 (9th Cir. 2005). "The test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." *Id.* (internal quotation marks and citations omitted). In other words, "[t]he court must be able to grant effective relief, or it lacks jurisdiction and must dismiss the appeal." *Pub. Util. Comm'n v. FERC*, 100 F.3d 1451, 1458 (9th Cir. 1996).

[2] Even assuming that this case might otherwise be moot, "[t]here are . . . four major exceptions to the mootness doctrine, for (1) collateral legal consequences; (2) wrongs capable of repetition yet evading review; (3) voluntary cessation; and (4) class actions where the named party ceases to represent the class." *In re Burrell*, 415 F.3d at 998. Two of these exceptions apply in this case.

[3] The collateral legal consequences exception applies because, although the primary injury may have passed (FedEx has now provided the sought-after information), there remains "a substantial controversy, between parties having adverse legal interests, of

sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 999 (emphasis omitted) (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974)). If we were to agree with FedEx's legal argument that the EEOC lacks the authority to investigate a charge after the charging party initiates a private lawsuit, the EEOC's investigation would come to an end. If, on the other hand, we affirm the district court, the EEOC will be able to proceed with the Merritt investigation. If we demur from deciding the legal questions presented by this litigation, the EEOC's authority to continue its investigation based upon the Merritt charge would remain contested, and FedEx will be uncertain whether it needs to comply with future requests for information. Thus, a "collateral" injury survives that can be remedied by this court even though the primary injury may have been resolved. This conclusion is consistent with our cases that have held that complying with an administrative subpoena does not moot an appeal when "our decision affects numerous collateral circumstances." *FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997); *see Mont. Sulphur*, 32 F.3d at 443 n.4 (holding that just because the subpoenaed party has "produced most and possibly all of the documents required by the subpoena," that "does not render the appeal moot, because our decision will still have collateral consequences"); *Alyeska Pipeline Serv. Co.*, 836 F.2d at 445 (holding that a subpoena appeal was not moot because reversal would result in documents being returned).

Nor will we dismiss a case as moot if the defendant voluntarily ceases the allegedly improper conduct, as FedEx has done, but where the defendant remains free

to return to the challenged conduct at any time. As the Supreme Court put it:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000) (internal quotation marks, citations, and brackets omitted); *accord Anderson*, 371 F.3d at 502 n.27.

[4] Here, FedEx has given no assurance that it will not challenge another administrative subpoena stemming from the Merritt charge; instead, it states only that

> since the EEOC has not made any additional requests and has not even identified any information it presumably lacks, FedEx has not objected to any such requests. Indeed, depending on the nature of any future [EEOC

> requests pursuant to the Merritt charge], FedEx may not object especially since it may have already provided the information in response to the [other] subpoenas.

Appellant's Notice of Mootness at 3. Given FedEx's own equivocal representations — "FedEx *may* not object" — it clearly has not met its "heavy burden of persuading the court" that "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *See Friends of the Earth*, 528 U.S. at 189.

[5] For each of these reasons, we conclude that this appeal is not moot and, therefore, deny FedEx's request for dismissal of the appeal.

II. Enforceability of the Administrative Subpoena

[6] Turning now to the merits, we must first decide whether the EEOC's subpoena power ceases when the EEOC issues a right-to-sue letter and the charging party initiates litigation based upon that charge. This question presents an issue of first impression in the Ninth Circuit. Our review of FedEx's challenges to the EEOC's subpoena is limited. As we have explained:

> The scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1076 (9th Cir. 2001) (quoting *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *as recognized by Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994)). FedEx's challenge is grounded on factor (1) that the EEOC lacked the authority to investigate, and factor (3) that the evidence sought by the EEOC was not relevant and material to the investigation.

Regarding whether Congress has granted the authority to investigate, we have "emphasized the 'strictly limited' role of the district court when an agency subpoena is attacked for lack of jurisdiction." *Children's Hosp. Med. Ctr.*, 719 F.2d at 1430. "As long as the evidence is relevant, material and there is some 'plausible' ground for jurisdiction, or, to phrase it another way, unless jurisdiction is 'plainly lacking,' the court should enforce the subpoena." *Id.* (internal citations omitted). "[A] party may not defeat agency authority to investigate with a claim that could be a defense if the agency subsequently decides to bring an action against it." *Id.* at 1429. The judicial inquiry is narrow because "judicial review of early phases of an administrative inquiry results in interference with the proper functioning of the agency and delays resolution of the ultimate question whether the Act was violated." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 n.38 (1984) (internal quotation marks, emendations, and citations omitted). Here, we conclude that the EEOC has at least a plausible basis for jurisdiction to issue an administrative subpoena even after Merritt filed his individual action.

Title VII of the Civil Rights Act of 1964, as amended, proscribes various employment practices involving discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-2, 2000e-3. The EEOC bears the "[p]rimary responsibility for enforcing Title VII." *Shell Oil Co.*, 466 U.S. at 61-62 (citing 42 U.S.C. § 2000e-5(a)).

[7] "Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *Id.* (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)). The EEOC's enforcement responsibilities are triggered by the filing of a charge of discrimination. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990). A charge may be filed by an individual who alleges that he was discriminated against or by a Commissioner of the EEOC. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.7(a). A Commissioner may file a charge when a victim of discrimination is reluctant to file a charge for fear of employer retaliation, *see* 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.7(a), 1601.11 (2007), or when the Commissioner believes that an employer has engaged in a "pattern or practice of discrimination," 42 U.S.C. § 2000e-6(e), *see Shell Oil Co.*, 466 U.S. at 62.

[8] Once the charge is filed, "[t]he EEOC is then *required* to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Occidental Life Ins. Co.*, 432 U.S. at 359 (emphasis added); *see also Univ. of Pa.*, 493 U.S. at 190 ("The Act *obligates* the Commission to investigate a charge of discrimination[.]" (emphasis added)); 42 U.S.C. § 2000e-5(b) (EEOC "shall make an investigation thereof"); 29 C.F.R. § 1601.15 ("The investigation of a charge *shall be made* by the

Commission[.]" (emphasis added)). "To enable the Commission to make informed decisions at each stage of the enforcement process, § 2000e-8(a) confers a broad right of access to relevant evidence[.]" *Univ. of Pa.*, 493 U.S. at 191. The EEOC "is entitled to inspect and copy 'any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation.'" *Shell Oil Co.*, 466 U.S. at 63 (quoting 42 U.S.C. § 2000e-8(a)). In acquiring such evidence, the EEOC may exercise all powers enjoyed by the NLRB under 29 U.S.C. § 161, including the authority to issue administrative subpoenas and to request judicial enforcement of those subpoenas. 42 U.S.C. § 2000e-9; *Shell Oil Co.*, 466 U.S. at 63; *accord Univ. of Pa.*, 493 U.S. at 191.

If the EEOC "determines after investigation that there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b); *see also* 29 C.F.R. §§ 1601.20, 1601.24(a). If those efforts don't work, the EEOC may then bring a civil action against the employer, 42 U.S.C. § 2000-e5(f)(1); 29 C.F.R. § 1601.27, in which the charging party may intervene as a matter of right, 42 U.S.C. § 2000 e5(f)(1). If the EEOC fails to bring such an action, the individual employee may bring an action against the employer directly. *Id.* § 2000e-5(f)(1) (providing for issuance of a right-to-sue notice on dismissal of a charge or failure to resolve a charge by conciliation within 180 days). The right-to-sue notice may also be issued to the charging party upon request, 29 C.F.R. § 1601.28(a), or when the EEOC determines

that there is reasonable cause to believe that Title VII has been violated, yet was unable to obtain voluntary compliance, but decides not to bring an action against the employer, *id.* § 1601.28(b). The EEOC may intervene in the charging party's lawsuit at the court's discretion. 42 U.S.C. § 2000e5(f)(1).

Generally, when the EEOC issues a right-to-sue notice, it terminates its processing of the charge, but not always:

> Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless [an enumerated official of the Commision] determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge.

29 C.F.R. § 1601.28(a)(3).

The EEOC has interpreted § 1601.28(a)(3) to mean that "further processing the charge" includes further investigation:

> *Continue Processing After NRTS [Notice of Right to Sue] Is Issued* — Continue processing the charge after issuing the NRTS whenever a cause LOD has been issued and as follows:
>
> . . . .
>
> (c) *To Otherwise Effectuate the Purposes of Title VII/ADA* — Ordinarily continue investigating when the charge covers persons other than the requestor or involves an acknowledged/documented respondent policy or possible

> pattern of discrimination affecting others; or when the DD otherwise determines that continued action would effectuate the purposes of Title VII/ADA.

1 EEOC Compliance Manual § 6.4 (June 2006), *available at* 2006 WL 4672976.[2]

[9] Thus, we read Title VII, the relevant regulations, and the EEOC's interpretation of those regulations to mean that: (1) the EEOC's investigative mandate is triggered by the filing of a valid charge; (2) the EEOC may bring its own action or may issue a right-to-sue notice to the charging party; and (3) even though the EEOC normally terminates the processing of the charge when it issues the right-to-sue notice, it can, under limited circumstances, continue to investigate the allegations in the charge, which includes the authority to subpoena information relevant to that charge. Here, Merritt filed a charge alleging personal discrimination and discrimination against other similarly situated African Americans and Latinos. The EEOC, pursuant to Merritt's request, issued to him a right-to-sue notice. The EEOC decided, however, to continue investigating Merritt's charge because it involved a possible policy or pattern of

---

[2] The EEOC's interpretation of its own regulation "is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *accord Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1154 (2008); *Miller v. Cal. Speedway Corp.*, 2008 WL 3169130, at *11 (9th Cir. Aug. 8, 2008). The EEOC's interpretation that "further processing the charge" includes further investigation is neither plainly erroneous nor inconsistent with the regulation.

discrimination affecting others. We have found nothing to suggest that the EEOC exceeded its authority in doing so.

[10] Thus, we conclude that the EEOC did not "plainly lack" the authority to issue the subpoena. *See Children's Hosp. Med. Ctr.*, 719 F.2d at 1430. Because there is, at the very least, a "plausible ground for jurisdiction," the district court did not err in enforcing the subpoena. *See id.*

The Fifth Circuit is the only other circuit to have addressed the question of whether the EEOC's authority to issue an administrative subpoena ceases when the charging party files suit. *See EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). The Fifth Circuit concluded that "in a case where the charging party has requested and received a right to sue notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with the EEOC, *that charge* no longer provides a basis for EEOC investigation." *Id.* at 469-70 (emphasis in the original). For the reasons we discuss below, we cannot agree with the Fifth Circuit.

Hearst reasoned that Title VII's multistep enforcement procedure, which according to the *Hearst* court is "divided into four distinct stages: filing and notice of charge, investigation, conference and conciliation, and finally, enforcement," means that once an action is brought based upon a charge, the time for investigation has passed, and thus, the EEOC is divested of subpoena authority. *Id.* at 468-69. As the Fifth Circuit saw it, "once formal litigation is commenced," the purposes of Title VII are no longer furthered by the EEOC's continued investigation of the

charge and, for that reason, the investigatory authority ceases once the charging party files suit. *Id.* For a number of reasons, we cannot agree that the agency "plainly lacks" the authority to issue an administrative subpoena after the charging party files suit.[3]

First, the steps in the EEOC's "multistep" enforcement procedure are not "distinct," as the *Hearst* court characterized it. The fact that one stage of the

---

[3] We note that *Hearst* did not review the administrative subpoena under the deferential standard that our decision in *Children's Hospital* requires. *Compare Hearst*, 103 F.3d at 464 (noting that the EEOC cited our decision in *Children's Hospital*, but implicitly rejecting our approach), *with Children's Hosp. Med. Ctr.*, 719 F.2d at 1430 (holding that an administrative subpoena is to be enforced unless jurisdiction is "plainly lacking"). We believe that it is well-established that an administrative subpoena is to be enforced unless agency authority is plainly lacking. *See, e.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) ("The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration."); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (reaffirming holding that "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in an agency to regulate or to investigate"); *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 5-6 (1st Cir. 1996) ("We have repeatedly admonished that questions concerning the scope of an agency's substantive authority to regulate are not to be resolved in subpoena enforcement proceedings. . . . As long as the agency's assertion of authority is not apocrypha, a procedurally sound subpoena must be enforced."); *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982) ("It is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute."). *Hearst* ignored that body of law.

enforcement procedure is going on does not mean that another stage has ceased. The Supreme Court has described the multistep enforcement procedure as an "integrated" procedure "that enables the Commission to detect and remedy instances of discrimination." *Shell Oil Co.*, 466 U.S. at 62. The investigation need not end simply because the EEOC is trying to remedy the discrimination through conference and conciliation. As the Supreme Court put it, "[t]o enable the Commission to make informed decisions *at each stage* of the enforcement process, § 2000e-8(a) confers a *broad right* of access to relevant evidence[.]" *Univ. of Pa.*, 493 U.S. at 191 (emphases added). Thus, the beginning of another stage does not necessarily terminate the preceding stage, and Title VII confers upon the EEOC investigatory authority during *each* stage.

We also disagree with *Hearst*'s notion that the charging party can, through his or her actions (that is, by filing suit), divest the EEOC of authority. As the Supreme Court recognized, the EEOC controls the charge regardless of what the charging party decides to do. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002) ("[O]nce a charge is filed, . . . under the—statute the EEOC is in command of the process."); *cf. id.* at 297 ("We have recognized several situations in which the EEOC does not stand in the employee's shoes.").

In *Waffle House*, the Court was faced with deciding "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the [EEOC] from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action[.]" *Id.* at 282. The Supreme

Court concluded that the employee's arbitration agreement did not hinder the EEOC's ability to prosecute the charge, reasoning that:

> [T]he EEOC takes the position that it may pursue a claim on the employee's behalf even after the employee has disavowed any desire to seek relief. The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. Absent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief. And if the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum.

Id. at 291-92. We have echoed the view that the EEOC, and not the charging party, is the master of the case. *See EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987) ("The EEOC's right of action is independent of the employee's private action rights.").

We further disagree with *Hearst*'s conclusion that Title VII's purposes are no longer served by a continuing investigation after the charging party has filed suit. The EEOC's investigatory authority serves a greater purpose than just investigating a charge on behalf of an individual. *See Waffle House*, 534 U.S. at 287. That is, "[t]he EEOC is not merely a proxy for victims of discrimination, but acts also to vindicate the public interest in preventing employment discrimination." *See Goodyear Aerospace Corp.*, 813

F.2d at 1542 (internal quotation marks omitted). The individual, of course, is guided by a desire to remedy his or her own discriminatory treatment, whereas the EEOC "is guided by the overriding public interest in equal employment opportunity asserted through direct Federal enforcement." *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) (internal quotation marks and ellipses omitted). By continuing to investigate a charge of systemic discrimination even after the charging party has filed suit, the EEOC is pursuing its obligation to serve the public interest. Indeed, *Hearst* failed even to consider 29 C.F.R. § 1601.28(a)(3), which makes clear that the EEOC has concluded that a continuing investigation can further the public interest, even after the charging party has filed suit. *Compare Hearst*, 103 F.3d at 462-70 (failing to discuss or cite 29 C.F.R. § 1601.28(a)(3)), *with* 29 C.F.R. § 1601.28(a)(3) (authorizing the continuing processing of a charge, even after the charging party has filed suit, when "it would effectuate the purpose of title VII").

Finally, with respect to the *Hearst* decision, *Hearst* held that the EEOC was divested of authority even though nothing in § 706(f)(1) of Title VII indicates that the EEOC's investigatory powers over a charge cease when the charging party files a private action. *See* 42 U.S.C. § 2000e-5(f)(1). As the Supreme Court has concluded, "[a]bsent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed" to the continuing investigation of a charge.[4] *Waffle House*, 534 U.S. at 291-92; *cf.*

---

[4] We also note that the *Hearst* court's conclusion was clearly motivated by a desire to impose time limits on EEOC authority.

Occidental Life Ins. Co., 432 U.S. at 361 ("Nothing in § 706(f)(1) indicates that EEOC enforcement powers

---

See Hearst, 103 F.3d at 468 ("[M]any cases pend for years in 'administrative limbo' with the EEOC, as information grows stale and memories fade. . . . Finality is apparently not a word in the EEOC lexicon."). The *Hearst* court lamented that § 2000e-5(f)'s provision which provides that "[after 180 days] the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought . . . (A) by [any charging parties] or (B) by [persons aggrieved by a practice challenged in a Commissioner's charge]," imposed no time limits on EEOC authority. *Id.* at 466-67. To that court, "the purpose of the notice at the end of the 180-day period primarily must be to signify the end of agency action with respect to the charge." *Id.* at 467. *Hearst* recognized, however, that "[i]f Title VII were interpreted as [it] believe[d] the text demands, [it] logically could conclude only that the EEOC's investigation of a charge must also end, absent some extenuating circumstance peculiar to the case under investigation that invokes principles of equity, after the 180-day period passed—irrespective of whether the charging party elected to sue," but, as the *Hearst* court noted, the Supreme Court had already decided differently. *Id.* at 467-68 (citing *Occidental Life Ins. Co.*, 432 U.S. at 366). Undeterred, the Fifth Circuit reasoned that the "case before [it was] not controlled by *Occidental*." *Id.* at 469. Thus, the *Hearst* court could still conclude that "the time for investigation ha[d] passed." *Id.* By holding that the EEOC's investigatory authority terminates after a charging party files suit, the Fifth Circuit sought to accomplish what the Supreme Court rejected in *Occidental Life*—the imposition of a time limit on the EEOC's authority over a charge. *See Hearst*, 103 F.3d at 468-69. We are not persuaded by this approach—a lower court should examine a case in light of the reasoning as well as the narrowest possible holding of a Supreme Court decision. *See Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) ("We hold that the issues decided by the higher court need not be identical in order to be controlling.").

cease if the complainant decides to leave the case in the hands of the EEOC rather than to pursue a private action.").

For the foregoing reasons, we decline to adopt *Hearst*'s rationale as the law of this Circuit, preferring instead a straightforward reading of Title VII and the relevant regulations.

Finally, we note that FedEx makes a series of arguments, all of which boil down to this: Title VII prohibits the EEOC from initiating a lawsuit based upon a charge after the charging party files suit, and therefore the EEOC lacks the authority to continue investigating a charge with respect to which it no longer has the authority to bring an action. As should be clear from our preceding discussion, FedEx's contention that Title VII prohibits the EEOC from initiating an EEOC action based upon Merritt's charge once Merritt has filed his action is, at best, a dubious statement of the law. *See Waffle House*, 534 U.S. at 297 ("We have recognized several situations in which the EEOC does not stand in the employee's shoes."); *Goodyear Aerospace*, 813 F.2d at 1542 ("The EEOC's right of action is independent of the employee's private action rights.").

[11] Nevertheless, we need not decide whether the EEOC has the authority to bring such a lawsuit. That question should be decided in a case where the EEOC actually brings a duplicative lawsuit, not in an action to enforce an administrative subpoena. *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1077-78 (noting that when we review an administrative subpoena we will "decline[ ] to resolve . . . potential defenses to enforcement actions"); *Children's Hosp. Med. Ctr.*, 719

F.2d at 1429 ("[A] party may not defeat agency authority to investigate with a claim that could be a defense if the agency subsequently decides to bring an action against it."). For example, in *Children's Hospital*, we concluded that "whether res judicata might bar a subsequent lawsuit was simply irrelevant to the inquiry whether the EEOC could issue administrative subpoenas . . . ." *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1076 (discussing *Children's Hosp.*, 719 F.2d at 1429). Here, we conclude that whether the EEOC may be barred from bringing a subsequent lawsuit based upon the Merritt charge is simply irrelevant to whether the EEOC could issue an administrative subpoena based upon that charge.

For all of these reasons, we hold that the EEOC retains the authority to issue an administrative subpoena against an employer even after the charging party has been issued a right-to-sue notice and instituted a private action based upon that charge.

III. Does the subpoena seek relevant information

Next, FedEx contends that the subpoena seeks irrelevant information and is overbroad.

A. Relevant information

[12] "[C]ourts must enforce administrative subpoenas unless the evidence sought by the subpoena is plainly incompetent or irrelevant to any lawful purpose of the agency." *Id.* at 1076 (internal quotation marks and citations omitted); *accord Children's Hosp. Med. Ctr.*, 719 F.2d at 1428. Relevancy is determined in terms of the investigation rather than in terms of

evidentiary relevance. *See Children's Hosp. Med Ctr.*, 719 F.2d at 1428 ("[T]he evidence [must be] relevant and material *to the investigation*." (emphasis added)). Moreover, the relevancy requirement is "not especially constraining." *Shell Oil Co.*, 466 U.S. at 68. The term "relevant" is "generously construed" to "afford[ ] the Commission access to virtually any material that might cast light on the allegations against the employer." *Id.* at 68-69.

The subpoena in this case asks FedEx only to identify any computerized files that it has or currently maintains. FedEx, the district court, and the EEOC all agree that that information is not necessarily relevant in an evidentiary sense. That is, the information sought is not itself evidence of discriminatory treatment in violation of Title VII. Rather, the information will help the EEOC craft additional information requests that may produce evidence of discriminatory treatment.

The Fourth Circuit has addressed this issue in a case involving very similar facts, holding that the evidence sought was relevant:

> [I]dentification of the computerized personnel information . . . is directly relevant to its investigation
>
> . . . .
>
> Such data permits the Commission to better focus its investigation. [T]his information will enable the EEOC to perform its investigative function by allowing it to frame more specific requests which will limit the possibility that irrelevant or unnecessary material will be

> produced for the EEOC to review. The efficient search for relevant information is imperative in a case like this, where the Commission must investigate not one or two claims against the company, but nearly two dozen. Without this means of locating pertinent data, both the EEOC and the employer could be overwhelmed by the sheer quantity of information needed to address each claim treated individually.

EEOC v. Lockheed Martin Corp., Aero & Naval Sys., 116 F.3d 110, 114 (4th Cir. 1997) (internal quotation marks omitted). We agree with and adopt the Fourth Circuit's analysis.

[13] The EEOC's need to focus the investigation is even more pressing in this case. In *Lockheed Martin*, the EEOC was investigating "nearly two dozen claims," whereas here, the EEOC is investigating a charge that alleges systemic discrimination affecting African American and Latino employees in FedEx's eleven-state Western region. "In sum, in asking [FedEx] to identify what computerized personnel files it had maintained, the EEOC subpoenaed relevant information, i.e., information that affords it an opportunity to determine what material 'might cast light on the allegations against the employer.'" *Lockheed Martin Corp.*, 116 F.3d at 114 (quoting *Shell Oil Co.*, 466 U.S. at 69). Thus, the subpoena seeks information "relevant and material *to the investigation*." *See Children's Hosp. Med. Ctr.*, 719 F.2d at 1428 (emphasis added).

B. Overbroad

Finally, FedEx makes two distinct arguments that the subpoena is overbroad. First, FedEx argues that the subpoena is overbroad because the EEOC "demand[s] personnel information concerning applicants, hiring, job analyses, evaluations, demotions, training, and terminations, [that] ha[ve] no relevance to the specific claims of discrimination asserted in the charges." This argument simply rehashes the relevancy argument that we have already rejected. The subpoena need not request only evidence that is specifically relevant to proving discrimination; the requested information need only be "relevant and material *to the investigation*." *Id.*

[14] Next, FedEx argues that the subpoena is overbroad as to the requested class information because "[w]hen there is an individual charge, a district court should decline a company-wide subpoena if the EEOC has not offered evidence of the relevancy of the company-wide data." We disagree. Merritt's charge, although brought by an individual, alleges a pattern and practice of racial discrimination. Because it raises the specter of systemic discrimination, the EEOC has the authority to investigate charges of discrimination beyond the alleged individual discrimination specifically committed against Merritt. The district court should not "decline" to enforce such a subpoena. To the contrary, it should enforce it as the EEOC plainly has jurisdiction to seek company-wide data.

The EEOC, by requesting identification of computerized files instead of the files themselves, has refrained from imposing on FedEx an overbroad

request. Because the charge allegations are so broad, the EEOC has demonstrated restraint by requesting identification of the computerized files and not the files themselves. The information sought by the EEOC will afford it the opportunity to make sure that it doesn't request vastly more information than it needs. As the EEOC correctly points out, "the subpoena is designed to solicit information from FedEx that will enable the EEOC to draft a future request for employee documents that will *not* be overly broad." The subpoena is not overbroad.

CONCLUSION

To enable the EEOC to make informed decisions at each stage of the enforcement process, Congress has conferred upon it a broad right of access to relevant evidence. Given this broad grant of power, it can hardly be said that the EEOC plainly lacks jurisdiction. Because Congress granted the EEOC the authority to investigate (and nothing in Title VII divests the EEOC of that authority when a charging party files suit) and because the evidence requested by the EEOC is relevant and material to the investigation, the district court did not err in enforcing the EEOC's administrative subpoena. The judgment of the district court is

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-16864
D.C. No. CV 06-0276 RCC

[Filed September 10, 2008]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellee*,	)
v.	)
FEDERAL EXPRESS CORPORATION, *Defendant-Appellant*.	)

Appeal from the United States District Court
for the District of Arizona
Raner C. Collins, District Judge, Presiding

Argued and Submitted
June 13, 2008—San Francisco, California

Filed September 10, 2008

Before: A. Wallace Tashima, M. Margaret McKeown, and Ronald M. Gould, Circuit Judges.

COUNSEL

Frederick L. Douglas, Memphis, Tennessee, for the defendant-appellant.

Susan R. Oxford, Equal Employment Opportunity Commission, Washington, DC, for the plaintiff-appellee.

Laura Ann Giantris, McGuiness Norris & Williams, Washington, DC, for *amici curiae* The Chamber of Commerce of the United States of America, and Equal Employment Advisory Council.

OPINION

TASHIMA, Circuit Judge:

We consider three issues pertaining to Federal Express Corporation's ("FedEx") refusal to comply with an administrative subpoena issued by the Equal Employment Opportunity Commission ("EEOC" or "Commission"). First, we consider whether FedEx's compliance with an administrative subpoena in another case, which resulted in FedEx providing the EEOC with the same information that the EEOC seeks to compel in this case, moots this appeal. We hold that it does not. Second, we consider, as a matter of first impression, whether the EEOC retains the authority to issue an administrative subpoena against an employer after a charging party has been issued a right-to-sue notice and instituted a private action. We hold that the EEOC does. Third and finally, we consider whether the EEOC subpoena in this case,

which does not seek direct evidence of discrimination, but instead, seeks general employment files in order to help the EEOC draft future information requests, seeks evidence "relevant" to a charge of systemic discrimination. We hold that it does. In light of these holdings, we affirm the district court's decision to enforce the administrative subpoena.

JURISDICTION

The district court had jurisdiction to determine the enforceability of an administrative subpoena pursuant to §§ 706(b) and 710 of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(b) (requiring the EEOC to investigate charges of discrimination); *id.* § 2000e-9 (granting to the EEOC the investigatory and subpoena powers of the National Labor Relations Board ("NLRB") by incorporating 29 U.S.C. § 161, which provides that the district courts have jurisdiction to determine the enforceability of an administrative subpoena). We have jurisdiction pursuant to 28 U.S.C. § 1291 because "an order of a District Court enforcing an administrative subpoena is final and ripe for review." *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 445 (9th Cir. 1988).

BACKGROUND

On November 27, 2004, Tyrone Merritt filed a charge of discrimination with the EEOC against FedEx on behalf of himself and similarly situated African American and Latino employees. Merritt alleged that FedEx's Basic Skills Test, a cognitive ability test which Merritt was required to pass to be eligible for a promotion, had a statistically significant adverse impact on African American and Latino

employees. Merritt also alleged that he had been personally denied promotion opportunities, unfairly disciplined, and denied compensation on account of his race.

Merritt, through counsel, requested a right-to-sue notice from the EEOC, which the EEOC issued to him on October 20, 2005. The EEOC, however, stated in that notice that it would continue to process Merritt's charge. On October 26, 2005, Merritt joined an already-pending class action against FedEx. *See Satchell v. Fed. Express*, No. 3:03-cv-0259 (N.D. Cal.). The *Satchell* action is limited geographically to FedEx's Western Region, an area encompassing eleven western states. FedEx employees outside that region are ineligible to join that action.

Pursuant to its continuing investigation, the EEOC issued an administrative subpoena to FedEx on February 10, 2006. The subpoena directed FedEx to identify basic information about the computer files that it maintains. The purpose of the information request was to aid the EEOC in fashioning a more detailed request if the need for more information should arise later in the investigation. The EEOC did not request any specific information about specific employees, nor did it request any employee files. The subpoena requested, in relevant part:

> Please identify any computerized or machine-readable files that are or have been maintained by you (or any other under contractual or other arrangement) since January 1, 2003 which contain data on personnel activities. This type of file would include, but not be limited to applicants, hiring, promotions, testing,

> discipline, job analyses and evaluations, performance evaluations, demotions, employment history, amounts of pay, adjustments to pay, work assignment, adjustments to work assignments, training, transfers, terminations, job status, and so forth.

FedEx refused to comply, filing a Petition to Revoke the Subpoena with the EEOC. The EEOC denied that petition. The EEOC then filed an action in district court to enforce its subpoena. FedEx argued that the EEOC is divested of investigatory authority once the party alleging the discriminatory practice initiates (or in this case joins) a private action. The district court rejected FedEx's argument and granted the EEOC's application to enforce the subpoena. Reasoning that "[t]he breadth of power granted the EEOC to investigate discrimination charges is such that validity of an administrative subpoena is not weakened unless the EEOC 'plainly lack[s]' jurisdiction," the district court concluded that there were "no defects in jurisdiction," and that "the evidence requested is relevant and material to the investigation." FedEx timely appealed.

Subsequently, FedEx filed a Notice of Mootness and Request for Dismissal of the appeal. FedEx represented that it had complied with an administrative subpoena relating to a charge filed by a different employee that is identical in every respect to the subpoena issued in this case, *i.e.*, it requested

the same information as the Merritt subpoena. The EEOC opposes FedEx's request.[1]

STANDARD OF REVIEW

The district court's order enforcing the EEOC's administrative subpoena is reviewed *de novo*. *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 443 (9th Cir. 1994); *see also In re Estate of Covington*, 450 F.3d 917, 919 n.4 (9th Cir. 2006).

ANALYSIS

I. Mootness

As a threshold matter, we consider FedEx's motion to dismiss this appeal on mootness grounds and conclude that this appeal is not moot. FedEx argues that the appeal is moot because it has fully complied with a subpoena in another proceeding, producing information to the EEOC that is "identical to the Merritt subpoena in every respect." Because of this production, FedEx argues further, "the EEOC now possesses all information sought by the Merritt subpoena."

[1] "A case is moot if the issues presented are no longer live and there fails to be a 'case or controversy' under Article III of the Constitution." *Pilate v. Burrell (In re Burrell)*, 415 F.3d 994, 998 (9th Cir. 2005). "The test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the

---

[1] We postponed consideration of the mootness issue so that it could be considered together with our determination of the merits.

event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." *Id.* (internal quotation marks and citations omitted). In other words, "[t]he court must be able to grant effective relief, or it lacks jurisdiction and must dismiss the appeal." *Pub. Util. Comm'n v. FERC*, 100 F.3d 1451, 1458 (9th Cir. 1996).

[2] Even assuming that this case might otherwise be moot, "[t]here are . . . four major exceptions to the mootness doctrine, for (1) collateral legal consequences; (2) wrongs capable of repetition yet evading review; (3) voluntary cessation; and (4) class actions where the named party ceases to represent the class." *In re Burrell*, 415 F.3d at 998. The first three apply in this case.

[3] The collateral legal consequences exception applies because, although the primary injury may have passed (FedEx has now provided the sought-after information), there remains "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 999 (emphasis omitted) (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974)). If we were to agree with FedEx's legal argument that the EEOC lacks the authority to investigate a charge after the charging party initiates a private lawsuit, the EEOC's investigation would come to an end. If, on the other hand, we affirm the district court, the EEOC will be able to proceed with the Merritt investigation. If we demur from deciding the legal questions presented by this litigation, the EEOC's authority to continue its investigation based upon the Merritt charge would remain contested, and FedEx will be uncertain

whether it needs to comply with future requests for information. Thus, a "collateral" injury survives that can be remedied by this court even though the primary injury may have been resolved. This conclusion is consistent with our cases that have held that complying with an administrative subpoena does not moot an appeal when "our decision affects numerous collateral circumstances." *FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997); *see Mont. Sulphur*, 32 F.3d at 443 n.4 (holding that just because the subpoenaed party has "produced most and possibly all of the documents required by the subpoena," that "does not render the appeal moot, because our decision will still have collateral consequences"); *Alyeska Pipeline Serv. Co.*, 836 F.2d at 445 (holding that a subpoena appeal was not moot because reversal would result in documents being returned).

[4] The wrong capable of repetition, yet evading review "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2662 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). We have "applied the evading-review doctrine where the 'duration of the controversy is solely within the control of the defendant.'" *Anderson v. Evans*, 371 F.3d 475, 502 n.27 (9th Cir. 2004) (quoting *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002)). This exception is particularly apt in this case because FedEx can comply with the administrative subpoena requesting preliminary information based upon another charge, thus mooting this case, and then turn around and

challenge the EEOC's next administrative subpoena based upon the Merritt charge, raising exactly the same legal arguments it raised in the district court and before us. And then FedEx can control the duration of that controversy by complying with the subpoena at a time of its choosing, and so on. Thus, "there is a reasonable expectation that the [EEOC] will be subject to the same action again." *Wis. Right to Life*, 127 S. Ct. at 2662 (internal quotations marks and citations omitted). Nothing about FedEx's compliance with the other subpoena ensures that the EEOC's next information request pursuant to the Merritt charge will not face the same challenge from FedEx. Thus, the capable of repetition yet evading review exception applies.

Nor will we dismiss a case as moot if the defendant voluntarily ceases the allegedly improper conduct, as FedEx has done, but where the defendant remains free to return to the challenged conduct at any time. As the Supreme Court put it:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The heavy burden of persuading the court that the

> challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 189 (2000) (internal quotation marks, citations, and brackets omitted); *accord Anderson*, 371 F.3d at 502 n.27.

[5] Here, FedEx has given no assurance that it will not challenge another administrative subpoena stemming from the Merritt charge; instead, it states only that

> since the EEOC has not made any additional requests and has not even identified any information it presumably lacks, FedEx has not objected to any such requests. Indeed, depending on the nature of any future [EEOC requests pursuant to the Merritt charge], FedEx may not object especially since it may have already provided the information in response to the [other] subpoenas.

Appellant's Notice of Mootness at 3. Given FedEx's own equivocal representations — "FedEx *may* not object" — it clearly has not met its "heavy burden of persuading the court" that "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *See Friends of the Earth*, 528 U.S. at 189.

[6] For each of these reasons, we conclude that this appeal is not moot and, therefore, deny FedEx's request for dismissal of the appeal.

II. Enforceability of the Administrative Subpoena

[7] Turning now to the merits, we must first decide whether the EEOC's subpoena power ceases when the EEOC issues a right-to-sue letter and the charging party initiates litigation based upon that charge. This question presents an issue of first impression in the Ninth Circuit. Our review of FedEx's challenges to the EEOC's subpoena is limited. As we have explained:

> The scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1076 (9th Cir. 2001) (quoting *EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *as recognized by Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994)). FedEx's challenge is grounded on factor (1) that the EEOC lacked the authority to investigate, and factor (3) that the evidence sought by the EEOC was not relevant and material to the investigation.

Regarding whether Congress has granted the authority to investigate, we have "emphasized the 'strictly limited' role of the district court when an agency subpoena is attacked for lack of jurisdiction."

Children's Hosp. Med. Ctr., 719 F.2d at 1430. "As long as the evidence is relevant, material and there is some 'plausible' ground for jurisdiction, or, to phrase it another way, unless jurisdiction is 'plainly lacking,' the court should enforce the subpoena." *Id.* (internal citations omitted). "[A] party may not defeat agency authority to investigate with a claim that could be a defense if the agency subsequently decides to bring an action against it." *Id.* at 1429. The judicial inquiry is narrow because "judicial review of early phases of an administrative inquiry results in interference with the proper functioning of the agency and delays resolution of the ultimate question whether the Act was violated." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 n.38 (1984) (internal quotation marks, emendations, and citations omitted). Here, we conclude that the EEOC has at least a plausible basis for jurisdiction to issue an administrative subpoena even after Merritt filed his individual action.

Title VII of the Civil Rights Act of 1964, as amended, proscribes various employment practices involving discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-2, 2000e-3. The EEOC bears the "[p]rimary responsibility for enforcing Title VII." *Shell Oil Co.*, 466 U.S. at 61-62 (citing 42 U.S.C. § 2000e-5(a)).

[8] "Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *Id.* (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)). The EEOC's enforcement responsibilities are triggered by the filing of a charge of discrimination. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 190 (1990). A charge may be filed by an individual who

alleges that he was discriminated against or by a Commissioner of the EEOC. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.7(a). A Commissioner may file a charge when a victim of discrimination is reluctant to file a charge for fear of employer retaliation, *see* 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.7(a), 1601.11 (2007), or when the Commissioner believes that an employer has engaged in a "pattern or practice of discrimination," 42 U.S.C. § 2000e-6(e), *see Shell Oil Co.*, 466 U.S. at 62.

[9] Once the charge is filed, "[t]he EEOC is then *required* to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Occidental Life Ins. Co.*, 432 U.S. at 359 (emphasis added); *see also Univ. of Pa.*, 493 U.S. at 190 ("The Act *obligates* the Commission to investigate a charge of discrimination[.]" (emphasis added)); 42 U.S.C. § 2000e-5(b) (EEOC "shall make an investigation thereof"); 29 C.F.R. § 1601.15 ("The investigation of a charge *shall be made* by the Commission[.]" (emphasis added)). "To enable the Commission to make informed decisions at each stage of the enforcement process, § 2000e-8(a) confers a broad right of access to relevant evidence[.]" *Univ. of Pa.*, 493 U.S. at 191. The EEOC "is entitled to inspect and copy 'any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation.'" *Shell Oil Co.*, 466 U.S. at 63 (quoting 42 U.S.C. § 2000e-8(a)). In acquiring such evidence, the EEOC may exercise all powers enjoyed by the NLRB under 29 U.S.C. § 161, including the authority to issue administrative subpoenas and to request judicial enforcement of those subpoenas. 42 U.S.C. § 2000e-9;

Shell Oil Co., 466 U.S. at 63; *accord Univ. of Pa.*, 493 U.S. at 191.

If the EEOC "determines after investigation that there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b); *see also* 29 C.F.R. §§ 1601.20, 1601.24(a). If those efforts don't work, the EEOC may then bring a civil action against the employer, 42 U.S.C. § 2000-e5(f)(1); 29 C.F.R. § 1601.27, in which the charging party may intervene as a matter of right, 42 U.S.C. § 2000e5(f)(1). If the EEOC fails to bring such an action, the individual employee may bring an action against the employer directly. *Id.* § 2000e-5(f)(1) (providing for issuance of a right-to-sue notice on dismissal of a charge or failure to resolve a charge by conciliation within 180 days). The right-to-sue notice may also be issued to the charging party upon request, 29 C.F.R. § 1601.28(a), or when the EEOC determines that there is reasonable cause to believe that Title VII has been violated, yet was unable to obtain voluntary compliance, but decides not to bring an action against the employer, *id.* § 1601.28(b). The EEOC may intervene in the charging party's lawsuit at the court's discretion. 42 U.S.C. § 2000e5(f)(1).

Generally, when the EEOC issues a right-to-sue notice, it terminates its processing of the charge, but not always:

> Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless [an enumerated official of the Commision]

> determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge.

29 C.F.R. § 1601.28(a)(3).

The EEOC has interpreted § 1601.28(a)(3) to mean that "further processing the charge" includes further investigation:

> *Continue Processing After NRTS [Notice of Right to Sue] Is Issued* — Continue processing the charge after issuing the NRTS whenever a cause LOD has been issued and as follows:
>
> . . . .
>
> (e) *To Otherwise Effectuate the Purposes of Title VII/ADA* — Ordinarily continue investigating when the charge covers persons other than the requestor or involves an acknowledged/documented respondent policy or possible pattern of discrimination affecting others; or when the DD otherwise determines that continued action would effectuate the purposes of Title VII/ADA.

1 EEOC Compliance Manual § 6.4 (June 2006), *available at* 2006 WL 4672976.[2]

---

[2] The EEOC's interpretation of its own regulation "is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *accord Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1154 (2008); *Miller v. Cal. Speedway Corp.*, 2008 WL 3169130, at *11 (9th Cir. Aug. 8, 2008). The EEOC's interpretation that

[10] Thus, we read Title VII, the relevant regulations, and the EEOC's interpretation of those regulations to mean that: (1) the EEOC's investigative mandate is triggered by the filing of a valid charge; (2) the EEOC may bring its own action or may issue a right-to-sue notice to the charging party; and (3) even though the EEOC normally terminates the processing of the charge when it issues the right-to-sue notice, it can, under limited circumstances, continue to investigate the allegations in the charge, which includes the authority to subpoena information relevant to that charge. Here, Merritt filed a charge alleging personal discrimination and discrimination against other similarly situated African Americans and Latinos. The EEOC, pursuant to Merritt's request, issued to him a right-to-sue notice. The EEOC decided, however, to continue investigating Merritt's charge because it involved a possible policy or pattern of discrimination affecting others. We have found nothing to suggest that the EEOC exceeded its authority in doing so.

[11] Thus, we conclude that the EEOC did not "plainly lack" the authority to issue the subpoena. *See Children's Hosp. Med. Ctr.*, 719 F.2d at 1430. Because there is, at the very least, a "plausible ground for jurisdiction," the district court did not err in enforcing the subpoena. *See id.*

The Fifth Circuit is the only other circuit to have addressed the question of whether the EEOC's authority to issue an administrative subpoena ceases

---

"further processing the charge" includes further investigation is neither plainly erroneous nor inconsistent with the regulation.

when the charging party files suit. *See EEOC v. Hearst Corp.*, 103 F.3d 462 (5th Cir. 1997). The Fifth Circuit concluded that "in a case where the charging party has requested and received a right to sue notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with the EEOC, *that charge* no longer provides a basis for EEOC investigation." *Id.* at 469-70 (emphasis in the original). For the reasons we discuss below, we cannot agree with the Fifth Circuit.

Hearst reasoned that Title VII's multistep enforcement procedure, which according to the *Hearst* court is "divided into four distinct stages: filing and notice of charge, investigation, conference and conciliation, and finally, enforcement," means that once an action is brought based upon a charge, the time for investigation has passed, and thus, the EEOC is divested of subpoena authority. *Id.* at 468-69. As the Fifth Circuit saw it, "once formal litigation is commenced," the purposes of Title VII are no longer furthered by the EEOC's continued investigation of the charge and, for that reason, the investigatory authority ceases once the charging party files suit. *Id.* For a number of reasons, we cannot agree that the agency "plainly lacks" the authority to issue an administrative subpoena after the charging party files suit.[3]

---

[3] We note that *Hearst* did not review the administrative subpoena under the deferential standard that our decision in *Children's Hospital* requires. *Compare Hearst*, 103 F.3d at 464 (noting that the EEOC cited our decision in *Children's Hospital*, but implicitly rejecting our approach), *with Children's Hosp. Med. Ctr.*, 719 F.2d at 1430 (holding that an administrative subpoena is to be enforced unless jurisdiction is "plainly lacking"). We believe that it is

First, the steps in the EEOC's "multistep" enforcement procedure are not "distinct," as the *Hearst* court characterized it. The fact that one stage of the enforcement procedure is going on does not mean that another stage has ceased. The Supreme Court has described the multistep enforcement procedure as an "integrated" procedure "that enables the Commission to detect and remedy instances of discrimination." *Shell Oil Co.*, 466 U.S. at 62. The investigation need not end simply because the EEOC is trying to remedy the discrimination through conference and conciliation. As the Supreme Court put it, "[t]o enable the Commission to make informed decisions *at each stage* of the enforcement process, § 2000e-8(a) confers a *broad right* of access to relevant evidence[.]" *Univ. of Pa.*, 493 U.S. at 191 (emphases added). Thus, the

---

well-established that an administrative subpoena is to be enforced unless agency authority is plainly lacking. *See, e.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) ("The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration."); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (reaffirming holding that "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in an agency to regulate or to investigate"); *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 5-6 (1st Cir. 1996) ("We have repeatedly admonished that questions concerning the scope of an agency's substantive authority to regulate are not to be resolved in subpoena enforcement proceedings. . . . As long as the agency's assertion of authority is not apocrypha, a procedurally sound subpoena must be enforced."); *Donovan v. Shaw*, 668 F.2d 985, 989 (8th Cir. 1982) ("It is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute."). *Hearst* ignored that body of law.

beginning of another stage does not necessarily terminate the preceding stage, and Title VII confers upon the EEOC investigatory authority during *each* stage.

We also disagree with *Hearst*'s notion that the charging party can, through his or her actions (that is, by filing suit), divest the EEOC of authority. As the Supreme Court recognized, the EEOC controls the charge regardless of what the charging party decides to do. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002) ("[O]nce a charge is filed, . . . under the statute the EEOC is in command of the process."); *cf. id.* at 297 ("We have recognized several situations in which the EEOC does not stand in the employee's shoes.").

In *Waffle House*, the Court was faced with deciding "whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the [EEOC] from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an enforcement action[.]" *Id.* at 282. The Supreme Court concluded that the employee's arbitration agreement did not hinder the EEOC's ability to prosecute the charge, reasoning that:

> [T]he EEOC takes the position that it may pursue a claim on the employee's behalf even after the employee has disavowed any desire to seek relief. The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. Absent textual support for a contrary view, it is the public agency's province—not that of the court—to

> determine whether public resources should be committed to the recovery of victim-specific relief. And; if the agency makes that determination, the statutory text unambiguously authorizes it to proceed in a judicial forum.

Id. at 291-92. We have echoed the view that the EEOC, and not the charging party, is the master of the case. *See EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987) ("The EEOC's right of action is independent of the employee's private action rights.").

We further disagree with *Hearst*'s conclusion that Title VII's purposes are no longer served by a continuing investigation after the charging party has filed suit. The EEOC's investigatory authority serves a greater purpose than just investigating a charge on behalf of an individual. *See Waffle House*, 534 U.S. at 287. That is, "[t]he EEOC is not merely a proxy for victims of discrimination, but acts also to vindicate the public interest in preventing employment discrimination." *See Goodyear Aerospace Corp.*, 813 F.2d at 1542 (internal quotation marks omitted). The individual, of course, is guided by a desire to remedy his or her own discriminatory treatment, whereas the EEOC "is guided by the overriding public interest in equal employment opportunity asserted through direct Federal enforcement." *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) (internal quotation marks and ellipses omitted). By continuing to investigate a charge of systemic discrimination even after the charging party has filed suit, the EEOC is pursuing its obligation to serve the public interest. Indeed, *Hearst* failed even to consider 29 C.F.R. § 1601.28(a)(3), which makes clear that the EEOC has concluded that a continuing

investigation can further the public interest, even after the charging party has filed suit. *Compare Hearst*, 103 F.3d at 462-70 (failing to discuss or cite 29 C.F.R. § 1601.28(a)(3)), *with* 29 C.F.R. § 1601.28(a)(3) (authorizing the continuing processing of a charge, even after the charging party has filed suit, when "it would effectuate the purpose of title VII").

Finally, with respect to the *Hearst* decision, *Hearst* held that the EEOC was divested of authority even though nothing in § 706(f)(1) of Title VII indicates that the EEOC's investigatory powers over a charge cease when the charging party files a private action. *See* 42 U.S.C. § 2000e-5(f)(1). As the Supreme Court has concluded, "[a]bsent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed" to the continuing investigation of a charge.[4] *Waffle House*, 534 U.S. at 291-92; *cf.*

---

[4] We also note that the *Hearst* court's conclusion was clearly motivated by a desire to impose time limits on EEOC authority. *See Hearst*, 103 F.3d at 468 ("[M]any cases pend for years in 'administrative limbo' with the EEOC, as information grows stale and memories fade. . . . Finality is apparently not a word in the EEOC lexicon."). The *Hearst* court lamented that § 2000e-5(f)'s provision which provides that "[after 180 days] the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought . . . (A) by [any charging parties] or (B) by [persons aggrieved by a practice challenged in a Commissioner's charge]," imposed no time limits on EEOC authority. *Id.* at 466-67. To that court, "the purpose of the notice at the end of the 180-day period primarily must be to signify the end of agency action with respect to the charge." *Id.* at 467. *Hearst* recognized, however, that "[i]f Title VII were interpreted as [it] believe[d] the text demands, [it] logically could conclude only that the EEOC's investigation of a charge

Occidental Life Ins. Co., 432 U.S. at 361 ("Nothing in § 706(f)(1) indicates that EEOC enforcement powers cease if the complainant decides to leave the case in the hands of the EEOC rather than to pursue a private action.").

For the foregoing reasons, we decline to adopt *Hearst*'s rationale as the law of this Circuit, preferring instead a straightforward reading of Title VII and the relevant regulations.

Finally, we note that FedEx makes a series of arguments, all of which boil down to this: Title VII prohibits the EEOC from initiating a lawsuit based upon a charge after the charging party files suit, and

---

must also end, absent some extenuating circumstance peculiar to the case under investigation that invokes principles of equity, after the 180-day period passed—irrespective of whether the charging party elected to sue," but, as the *Hearst* court noted, the Supreme Court had already decided differently. *Id.* at 467-68 (citing *Occidental Life Ins. Co.*, 432 U.S. at 366). Undeterred, the Fifth Circuit reasoned that the "case before [it was] not controlled by *Occidental*." *Id.* at 469. Thus, the *Hearst* court could still conclude that "the time for investigation ha[d] passed." *Id.* By holding that the EEOC's investigatory authority terminates after a charging party files suit, the Fifth Circuit sought to accomplish what the Supreme Court rejected in *Occidental Life*—the imposition of a time limit on the EEOC's authority over a charge. *See Hearst*, 103 F.3d at 468-69. We are not persuaded by this approach—a lower court should examine a case in light of the reasoning as well as the narrowest possible holding of a Supreme Court decision. *See Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) ("We hold that the issues decided by the higher court need not be identical in order to be controlling.").

therefore the EEOC lacks the authority to continue investigating a charge with respect to which it no longer has the authority to bring an action. As should be clear from our preceding discussion, FedEx's contention that Title VII prohibits the EEOC from initiating an EEOC action based upon Merritt's charge once Merritt has filed his action is, at best, a dubious statement of the law. *See Waffle House,* 534 U.S. at 297 ("We have recognized several situations in which the EEOC does not stand in the employee's shoes."); *Goodyear Aerospace*, 813 F.2d at 1542 ("The EEOC's right of action is independent of the employee's private action rights.").

[12] Nevertheless, we need not decide whether the EEOC has the authority to bring such a lawsuit. That question should be decided in a case where the EEOC actually brings a duplicative lawsuit, not in an action to enforce an administrative subpoena. *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1077-78 (noting that when we review an administrative subpoena we will "decline[ ] to resolve . . . potential defenses to enforcement actions"); *Children's Hosp. Med. Ctr.*, 719 F.2d at 1429 ("[A] party may not defeat agency authority to investigate with a claim that could be a defense if the agency subsequently decides to bring an action against it."). For example, in *Children's Hospital*, we concluded that "whether res judicata might bar a subsequent lawsuit was simply irrelevant to the inquiry whether the EEOC could issue administrative subpoenas . . . ." *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1076 (discussing *Children's Hosp.*, 719 F.2d at 1429). Here, we conclude that whether the EEOC may be barred from bringing a subsequent lawsuit based upon the Merritt charge is simply

irrelevant to whether the EEOC could issue an administrative subpoena based upon that charge.

For all of these reasons, we hold that the EEOC retains the authority to issue an administrative subpoena against an employer even after the charging party has been issued a right-to-sue notice and instituted a private action based upon that charge.

III. Does the subpoena seek relevant information

Next, FedEx contends that the subpoena seeks irrelevant information and is overbroad.

A. Relevant information

[13] "[C]ourts must enforce administrative subpoenas unless the evidence sought by the subpoena is plainly incompetent or irrelevant to any lawful purpose of the agency." *Id.* at 1076 (internal quotation marks and citations omitted); *accord Children's Hosp. Med. Ctr.*, 719 F.2d at 1428. Relevancy is determined in terms of the investigation rather than in terms of evidentiary relevance. *See Children's Hosp. Med Ctr.*, 719 F.2d at 1428 ("[T]he evidence [must be] relevant and material *to the investigation*." (emphasis added)). Moreover, the relevancy requirement is "not especially constraining." *Shell Oil Co.*, 466 U.S. at 68. The term "relevant" is "generously construed" to "afford[ ] the Commission access to virtually any material that might cast light on the allegations against the employer." *Id.* at 68-69.

The subpoena in this case asks FedEx only to identify any computerized files that it has or currently

maintains. FedEx, the district court, and the EEOC all agree that that information is not necessarily relevant in an evidentiary sense. That is, the information sought is not itself evidence of discriminatory treatment in violation of Title VII. Rather, the information will help the EEOC craft additional information requests that may produce evidence of discriminatory treatment.

The Fourth Circuit has addressed this issue in a case involving very similar facts, holding that the evidence sought was relevant:

> [I]dentification of the computerized personnel information . . . is directly relevant to its investigation
>
> . . . .
>
> Such data permits the Commission to better focus its investigation. [T]his information will enable the EEOC to perform its investigative function by allowing it to frame more specific requests which will limit the possibility that irrelevant or unnecessary material will be produced for the EEOC to review. The efficient search for relevant information is imperative in a case like this, where the Commission must investigate not one or two claims against the company, but nearly two dozen. Without this means of locating pertinent data, both the EEOC and the employer could be overwhelmed by the sheer quantity of information needed to address each claim treated individually.

EEOC v. Lockheed Martin Corp., Aero & Naval Sys., 116 F.3d 110, 114 (4th Cir. 1997) (internal quotation

marks omitted). We agree with and adopt the Fourth Circuit's analysis.

[14] The EEOC's need to focus the investigation is even more pressing in this case. In *Lockheed Martin*, the EEOC was investigating "nearly two dozen claims," whereas here, the EEOC is investigating a charge that alleges systemic discrimination affecting African American and Latino employees in FedEx's eleven-state Western region. "In sum, in asking [FedEx] to identify what computerized personnel files it had maintained, the EEOC subpoenaed relevant information, i.e., information that affords it an opportunity to determine what material 'might cast light on the allegations against the employer.'" *Lockheed Martin Corp.*, 116 F.3d at 114 (quoting *Shell Oil Co.*, 466 U.S. at 69). Thus, the subpoena seeks information "relevant and material *to the investigation*." *See Children's Hosp. Med. Ctr.*, 719 F.2d at 1428 (emphasis added).

B. Overbroad

Finally, FedEx makes two distinct arguments that the subpoena is overbroad. First, FedEx argues that the subpoena is overbroad because the EEOC "demand[s] personnel information concerning applicants, hiring, job analyses, evaluations, demotions, training, and terminations, [that] ha[ve] no relevance to the specific claims of discrimination asserted in the charges." This argument simply rehashes the relevancy argument that we have already rejected. The subpoena need not request only evidence that is specifically relevant to proving discrimination; the requested information need only be "relevant and material *to the investigation*." *Id.*

[15] Next, FedEx argues that the subpoena is overbroad as to the requested class information because "[w]hen there is an individual charge, a district court should decline a company-wide subpoena if the EEOC has not offered evidence of the relevancy of the company-wide data." We disagree. Merritt's charge, although brought by an individual, alleges a pattern and practice of racial discrimination. Because it raises the specter of systemic discrimination, the EEOC has the authority to investigate charges of discrimination beyond the alleged individual discrimination specifically committed against Merritt. The district court should not "decline" to enforce such a subpoena. To the contrary, it should enforce it as the EEOC plainly has jurisdiction to seek company-wide data.

The EEOC, by requesting identification of computerized files instead of the files themselves, has refrained from imposing on FedEx an overbroad request. Because the charge allegations are so broad, the EEOC has demonstrated restraint by requesting identification of the computerized files and not the files themselves. The information sought by the EEOC will afford it the opportunity to make sure that it doesn't request vastly more information than it needs. As the EEOC correctly points out, "the subpoena is designed to solicit information from FedEx that will enable the EEOC to draft a future request for employee documents that will *not* be overly broad." The subpoena is not overbroad.

CONCLUSION

To enable the EEOC to make informed decisions at each stage of the enforcement process, Congress has

conferred upon it a broad right of access to relevant evidence. Given this broad grant of power, it can hardly be said that the EEOC plainly lacks jurisdiction. Because Congress granted the EEOC the authority to investigate (and nothing in Title VII divests the EEOC of that authority when a charging party files suit) and because the evidence requested by the EEOC is relevant and material to the investigation, the district court did not err in enforcing the EEOC's administrative subpoena. The judgment of the district court is

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV 06-0276-TUC-RCC

[Filed September 8, 2006]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Applicant,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

ORDER GRANTING APPLICATION FOR ORDER TO SHOW CAUSE WHY AN ADMINISTRATIVE SUBPOENA SHOULD NOT BE ENFORCED

The matters now before the Court are the Applicant's Amended Application for Order to Show Cause Why an Administrative Subpoena Should Not Be Enforced (Docket Nos. 1 and 5), filed July 5, 2006, Respondent's Opposition to the Applicant's Application for an Order to Show Cause, filed July 24, 2006 (Docket No. 11), and Applicant's Reply in Support of

its Amended Application for Order to Show Cause Why an Administrative Subpoena Should Not Be Enforced (Docket No. 12), filed August 4, 2006.

After considering the Applicant's Application, Respondent's Opposition, and Applicant's Reply, the Court finds that the continued investigation of discrimination charges and subpoena fall under 29 C.F.R.1601.28 (a)(3), and would effectuate the purpose of Title VII of the Civil Rights Act of 1964. Thus, the Court will grant Applicant's Application, and order that Respondent comply with Applicant's subpoena EEOC PHX-06-18, dated February 10, 2006.

BACKGROUND

On November 27, 2004, Charging Party Tyrone Merritt ("Mr. Merritt") filed a charge of discrimination against Federal Express Corporation ("FedEx") on behalf of himself and other similarly-situated African-American and Hispanic employees. Merritt's counsel requested a Right to Sue Notice from the Equal Employment Opportunity Commission ("EEOC"), and was issued one on October 20, 2005. The notice also informed the parties of the EEOC's intent to continue processing the charge. On October 26, 2005, Mr. Merritt joined the *Satchell* class action suit against FedEx for himself and as a representative for other "similarly situated" African-American or Hispanic employees. The *Satchell* suit is limited geographically to FedEx's Western Region, an eleven-state area in the western United States. FedEx employees outside that region are barred from joinder.

As part of its continuing investigation, the EEOC issued an administrative subpoena (EEOC PHX-06-18)

on February 10, 2006. The subpoena directed FedEx to provide basic information about the type of computerized or machine readable files that it maintains, in order for the EEOC to fashion a more detailed query if and when the need should arise later in its investigation. No specific information was requested about any employee.

FedEx filed a Petition to Revoke, but that Petition was denied in the EEOC's Final Determination. FedEx was advised that if they did not produce the information sought, then the EEOC would have no choice but to seek judicial enforcement of its administrative subpoena. FedEx has not yet complied with the subpoena.

APPLICABLE LAW

The EEOC is authorized to sue in its own name to secure relief for individuals aggrieved by discriminatory practices forbidden by the Act, and, in exercising this enforcement power, Commission may seek relief for groups of employees or applicants for employment *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

When a charging party files with the EEOC an allegation of an employer's unlawful employment practice, the EEOC must investigate that claim in order to make a reasonable cause determination whether conciliation efforts are warranted. 42 U.S.C.S. 2000e-5(b). If reasonable cause is found and the efforts at conciliation with the employer fail, then the EEOC may bring a civil action against that employer. 42 U.S.C.S. 2000e-5 (f)(1). Subject to a court's discretion, the EEOC may also intervene in a charging party's

private action against the employer. 42 U.S.C.S. 2000e-5(f)(1)(B).

The EEOC is granted broad and liberally construed powers so that it may root out the unfairness, shame, and humiliation of racial discrimination in employment. *Motorola, Inc. v McLain* (7th Cir. 1973) 484 F. 2d 1339, *cert. denied*, 416 U.S. 936 (1974). It must be given broad access to any and all information relevant to the allegation(s) in order to prove or disprove a charge. 42 U.S.C.S. 2000e-8 (a). The court's role in determining the enforceability of an EEOC subpoena for such information is limited to finding the validity of the charge and weighing the relevance and legitimacy of the request. *University of Pa. v. EEOC*, 493 U.S. 182 (1990).

DISCUSSION

Respondent FedEx relies on *EEOC v. Hearst* for its contention that the EEOC no longer has jurisdiction to continue to process a charge after (1) the charging party has been issued a Notice of Right to Sue ("NRTS") after 180 days from bringing his charge, and (2) the charging party has sought enforcement in a private action. 103 F. 3d 462 (5th Cir. 1997). FedEx also contends that because Mr. Merritt has joined as a representative in a class action, he now has an alternative means of relief, and further EEOC involvement in processing that charge is unnecessary. FedEx claims that the EEOC's involvement should now be limited to either intervention in Mr. Merritt's case, or the processing of simple administrative tasks supposedly contemplated in 29 C.F.R. 1601.28(a)(3).

FedEx supports this argument by citing *EEOC v. Home Depot*, 01-CV-1771 W (JAH) (S.D. Cal. 2001), which adopted *Hearst* in its entirety. In *Home Depot*, a charging party had requested and received a NRTS and commenced private litigation. There, the Court found the EEOC's power to investigate terminated upon these events.

The EEOC asserts that *Hearst* is not controlling in this Circuit, and *Home Depot* is neither controlling nor sufficiently similar to warrant a similar order from the Court. 29 C.F.R.1601.28(a)(3) reads, in relevant part:

> Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless the District Director; Field Director; Area Director; Local Director; Director of the Office of Field Programs or upon delegation, the Director of Field Management Programs; or the General Counsel, **determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge**.

29 C.F.R.1601.28(a)(3) (emphasis added).

The EEOC contends that the allegations in Mr. Merritt's charge raise the specter of a nationwide pattern of race-based discrimination by FedEx against African-American and Latino employees. Joinder in the *Satchell* suit is limited to FedEx employees in its eleven-state Western Region. Any "similarly-situated" African-American and/or Latino FedEx employee outside this region is barred from joinder in the *Satchell* suit and, with the exception of the EEOC's

continued involvement, left with no satisfactory avenue for redress of possible discrimination claims. Title VII of the Civil Rights Act of 1964 "confers upon [the EEOC] the authority to evaluate the strength of the public interest at stake" *EEOC v. Waffle House*, 122 S. Ct. 754, 763 (2002). Although these charges were originally brought by Mr. Merritt, he no longer determines the direction of the case. As "master of its own case", the EEOC shall determine when its investigation shall cease. *Id.*

The EEOC contends that limiting its investigative powers at this stage would result in one of several untenable situations. First, without proper investigation, the EEOC would not be able to initiate efforts to attempt conciliation with an offending employer as mandated by 42 U.S.C.S. 2000e-5(b). In order to attempt conciliation, the EEOC must first investigate a charge, and then issue a letter of determination finding reasonable cause to believe that discrimination occurred. *Id.* Second, the EEOC's intervention in a charging party's private suit would be pre-empted. Only upon the failure of conciliation efforts can the EEOC seek to intervene in a charging party's private suit. 42 U.S.C.S. 2000e-5 (f)(1)(B). Third, and most relevant here, would be the curtailing of charges brought by members of the EEOC. Charges may be filed by a charging party or by a member of the EEOC. 42 U.S.C.S. 2000e-5(b). All of these options are predicated on the EEOC's initial investigation of the charges. The Court agrees.

The EEOC maintains it shall "have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices

covered by this subchapter and is relevant to the charge under investigation." 42 U.S.C.S. 2000e-8(a). Th Court finds the subpoena at issue relevant to the charges being investigated. The categories in later refinements of information requested by the EEOC are, if not directly relevant, sufficiently pertinent to the collection of relevant data that they fall under the umbrella of relevance and materiality. An examination of employee records is eminently reasonable in the investigation of discrimination charges.

FedEx contends that "convenience" is not a factor to be considered for the enforceability of a subpoena, citing for support *United State v. Coopers and Lybrand*, 550 F.2d 615 (10th Cir. 1977). *Coopers* involved an Internal Revenue Service request for a road map of an audit system "not only as an index, but as a key to understanding." *Id.* at 621. Whereas the audit system information in *Coopers* was sought for its own sake, the file management description here is sought solely as a means to tailor later inquiry. Given the nature of the underlying charges, the categories of information to be sought later are especially relevant, and would be enforceable by themselves if the subpoena had so requested. The subpoena as it is minimizes the burden both on FedEx's collection and the EEOC's receipt of relevant data [1]

---

[1] If convenience is indeed not a factor, FedEx is free to petition the Court so that it can collect and provide relevant employee data *in toto*.

CONCLUSION

The breadth of power granted the EEOC to investigate discrimination charges is such that validity of an administrative subpoena is not weakened unless the EEOC "plainly lack[s]" jurisdiction. *EEOC v. Karuk Tribe Housing Authority*, 260 F. 3d 1071, 1077 (9th Cir. 2001). The Court finds no such defects in jurisdiction. The scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation. *EEOC v. Children's Hospital Medical Center*, 719 F.2d 1426, 1428 (1983).

The Court is satisfied that Congress has granted the EEOC the power to continue investigating the current charges. Procedural requirements are not at issue in this case, and are presumed to have been followed. The Court is also satisfied that the evidence requested is relevant and material to the investigation. The EEOC must be able to continue the investigation of the charges in order to resolve any forms of discrimination suffered by FedEx employees outside the Western Region.

Accordingly, **IT IS HEREBY ORDERED** that Applicant's Application for an Order to Show Cause (Docket Nos. 1 and 5) is **GRANTED**.

DATED this 8th day of September, 2006.

/s/

Raner C. Collins
United States District Judge

APPENDIX D

STATUTES

*** CURRENT THROUGH PL 111-20,
APPROVED 05/15/2009 ***

TITLE 5. GOVERNMENT ORGANIZATION
AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

5 USCS § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

...

(b) This section does not apply to matters that are--

...

(3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular

criteria for withholding or refers to particular types of matters to be withheld;

...

*** CURRENT THROUGH PL 111-20, APPROVED 05/15/2009 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-5

§ 2000e-5. Enforcement provisions

...

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or

retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $ 1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination

on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by

the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local

proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

...

*** CURRENT THROUGH PL 111-20, APPROVED 05/15/2009 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-6

§ 2000e-6. Civil actions by the Attorney General

...

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure. Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972 [enacted March 24, 1972], the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act [42 USCS § 2000e-5].

*** CURRENT THROUGH PL 111-20,
APPROVED 05/15/2009 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

42 USCS § 2000e-12

§ 2000e-12. Rules and regulations

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title [42 USCS §§ 2000e et seq.]. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act [5 USCS §§ 551 et seq.].

...

*** CURRENT THROUGH PL 111-20,
APPROVED 05/15/2009 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR
INDIVIDUALS WITH DISABILITIES
MISCELLANEOUS PROVISIONS

42 USCS § 12212

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution,

including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

APPENDIX E

REGULATIONS

*** THIS SECTION IS CURRENT THROUGH
THE MAY 21, 2009 ISSUE OF
THE FEDERAL REGISTER ***

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS
RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
PART 1601 -- PROCEDURAL REGULATIONS
SUBPART B -- PROCEDURE FOR THE
PREVENTION OF UNLAWFUL
EMPLOYMENT PRACTICES

29 CFR 1601.11

§ 1601.11 Charges by members of the Commission.

(a) Any member of the Commission may file a charge with the Commission. Such charge shall be in writing and signed and shall be verified.

(b) A Commissioner who files a charge under paragraph (a) of this section may withdraw the charge with the consent of the Commission. The Commission may withdraw any charge filed under paragraph (a) of this section by a Commissioner who is no longer holding office when it determines that the purposes of title VII or the ADA are no longer served by processing

the charge. Commissioner charges may not be withdrawn pursuant to this section after a determination as to reasonable cause has been made. This paragraph does not apply to a charge filed by a Commissioner which is on behalf of a person claiming to be aggrieved within the meaning of § 1601.7 unless such person submits a written request for withdrawal to the Commission.

*** THIS SECTION IS CURRENT THROUGH THE MAY 21, 2009 ISSUE OF THE FEDERAL REGISTER ***

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1601 -- PROCEDURAL REGULATIONS
SUBPART B -- PROCEDURE FOR THE PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES
PROCEDURE CONCERNING THE INSTITUTION OF CIVIL ACTIONS

29 CFR 1601.28

§ 1601.28 Notice of right to sue: Procedure and authority.

(a) Issuance of notice of right to sue upon request. (1) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued and the charge to which the request relates is filed against a respondent other than a government, governmental

agency or political subdivision, the Commission shall promptly issue such notice as described in § 1601.28(c) to all parties, at any time after the expiration of one hundred eighty (180) days from the date of filing of the charge with the Commission, or in the case of a Commissioner charge 180 days after the filing of the charge or 180 days after the expiration of any period of reference under section 706(d) of title VII as appropriate.

...

(3) Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless the District Director; Field Director; Area Director; Local Director; Director of the Office of Field Programs or upon delegation, the Director of Field Management Programs; or the General Counsel, determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge. Issuance of a notice of right to sue shall not terminate the processing of a Commissioner charge.

...

*** THIS SECTION IS CURRENT THROUGH
THE MAY 21, 2009 ISSUE
OF THE FEDERAL REGISTER ***

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING
TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
PART 1610 -- AVAILABILITY OF RECORDS
SUBPART A -- PRODUCTION OR DISCLOSURE
UNDER 5 U.S.C. 552

29 CFR 1610.17

§ 1610.17 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in 552(b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence, and matters involving personal privacy.

(b) Section 706(b) of title VII provides that the Commission shall not make public charges which have been filed. It also provides that (subsequent to the filing of a charge, an investigation, and a finding that there is reasonable cause to believe that the charge is true) nothing said or done during and as a part of the Commission's endeavors to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion may be made public by the Commission without the written consent

of the parties concerned; nor may it be used as evidence in a subsequent proceeding. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of section 706(b) shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $ 1,000 or imprisoned not more than 1 year.

(c) Section 709 of title VII authorizes the Commission to conduct investigations of charges filed under section 706, engage in cooperative efforts with State and local agencies charged with the administration of State or local fair employment practices laws, and issue regulations concerning reports and record-keeping. Section (e) of section 709 provides that it shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under section 709 prior to the institution of any proceeding under the act involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of section 709(e) shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $ 1,000 or imprisoned not more than 1 year.

(d) Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

(e) Each executed statistical reporting form required under part 1602 of this chapter, such as Employer Information Report EEO-1, etc., relating to a particular employer is exempt from disclosure to the public prior to the institution of a proceeding under title VII involving information from such form.

(f) Section 107 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117) explicitly adopts the powers, remedies, and procedures set forth in sections 706 and 709 of title VII. Accordingly, the prohibitions on disclosure contained in sections 706 and 709 of title VII as outlined in paragraphs (b), (c), (d), and (e) of this section, apply with equal force to requests for information related to charges and executed statistical reporting forms filed with the Commission under the Americans with Disabilities Act.

(g) Requests for information relating to open case files covering alleged violations of the Equal Pay Act (29 U.S.C. 206(b)) or the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) will ordinarily be denied under the seventh exemption of the Freedom of Information Act as investigatory records compiled for law enforcement purposes.

(h) The medical, financial, and personnel files of employees of the Commission are exempt from disclosure to the public.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV06-276 TUC-RCC

[Dated August 28, 2006]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

vs.

FEDEX CORPORATION,

Respondent.

Tucson, Arizona
August 28, 2006
10:59 a.m.

Transcript of Show Cause Hearing
BEFORE THE HONORABLE RANER C. COLLINS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Appellant:

KATHERINE J. KRUSE, ESQ.
SANDRA PADEGIMAS, ESQ.
Equal Employment Opportunity Commission
District Office
3300 N. Central Ave., Suite 690
Phoenix, Arizona 85012-9688
602-640-5029

For the Respondent:

ALEC R. HILLBO, ESQ.
RONALD J. STOLKIN, ESQ.
Fennemore Craig, PC
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85012-2913
602-916-5448

Court Reporter:

Bonnie J. Brunotte, CSR, RMR
Official Court Reporter
405 W. Congress
Tucson, Arizona 85701
520-205-4267

Proceedings recorded by computer-aided realtime transcription.

[p.2] INDEX

Argument by Ms. Padegimas 4

Argument by Mr. Stolkin 18

Argument by Ms. Padegimas 39

[p.3] PROCEEDINGS

THE CLERK: Civil 06-276, EEOC versus FedEx Corporation, on for an order to show cause hearing.

Counsel, please state your appearance.

MS. PADEGIMAS: Good morning, Your Honor. Sandra Padegimas and Katherine Kruse for the applicant, EEOC.

THE COURT: Good morning.

MR. STOLKIN: Good morning, Your Honor. Ronald Stolkin, Fennemore Craig, on behalf of FedEx. I'd like to introduce the Court to Alec Hillbo.

THE COURT: Good morning. I believe we're here because EEOC is requesting some documents from your client, Mr. Stolkin.

MR. STOLKIN: They have subpoenaed that, yes.

THE COURT: And you have not yet complied with the subpoena, so they've asked for an order to show cause hearing be held to see whether you should be

made to comply or not. Is that simply put what we're here for?

MS. PADEGIMAS: Yes, Your Honor.

MR. STOLKIN: I think we agree on that.

THE COURT: Let's go.

And just for the record, I don't own stock in FedEx or EEOC or anybody else.

[p.4] MS. PADEGIMAS: Gee, I wish we could find a judge, Your Honor, who owns stock in EEOC.

MR. STOLKIN: We all do.

THE COURT: We're all stakeholders.

MS. PADEGIMAS: Actually, that's absolutely true. Thank you.

Your Honor, there are three compelling reasons why the Court should enforce this subpoena.

First, there is nothing in Title VII, in the EEOC regulations, in any amendment to Title VII that would suggest that the role as a litigator and an investigator of discrimination claims in the workplace is as narrow as this respondent would like it to be.

Secondly, the EEOC satisfied the criteria enunciated in the Ninth Circuit for enforcement of the subpoena.

And, finally, as much as this respondent would like to it be so, the Fifth Circuit's decision in *EEOC v. Hearst* is not binding, is not precedent on this court.

Let's start with the statute with Title VII. As Justice Marshal noted in *EEOC v. Shell*, the dominant purpose of Title VII is to root out discrimination in the workplace. And that's the role that Congress gave to the EEOC.

[p.5] Title VII, when it was enacted back in 1964, it was a wonderful statute. It was part of the Civil Rights Act of 1964 at the end of a lot of turmoil in our country. It was also a wonderful act because initially Congress and those responsible for enacting the Act hoped that employers would voluntarily comply with their obligations under the Act.

So towards that end at that time the EEOC played no role in investigation -- or in litigation. Our role was limited to receiving charges, investigating charges, and there was a major emphasis on trying to bring people who believed they'd been victims of discrimination and the employers to a settlement table and trying to get voluntary compliance.

That was the hope of Congress, and when the Act was established and became effective in 1964 the EEOC could not litigate. At that time only the Department of Justice under Title VII was allowed to litigate against private employers and then only in claims that alleged pattern and practice of discrimination, not in individual claims of discrimination.

Unfortunately, that experiment and voluntary compliance proved not to work, and Congress recognized [p.6] that in 1972 when they amended Title VII and changed the EEOC's role in the scheme of enforcement.

At that time, with the amendments, Congress gave the EEOC litigation authority for every kind of claim unless it was against a public entity, so the EEOC can't sue a city or a county or school district or a state under Title VII. That purview still belongs with the Department of Justice.

Since the amendments in 1972, the Supreme Court has had a number of occasions to look at the effect of those amendments have been regarding the EEOC's authority and their power.

In *EEOC v. General Telephone* the court stated that the 1972 amendments made it clear that the EEOC was to bear the primary responsibility for litigation, and with each time the three major cases that the Supreme Court has had an opportunity to look at how far the EEOC's authority should reach in being able to litigate, being able to go in for judicial enforcement of Title VII, each time the Supreme Court has done nothing to limit the EEOC's reach.

Starting with *EEOC v. General Telephone*, at issue in that case was whether the EEOC was going to have to comply with Rule 23's requirements for class certification. The Court said under the amendments [p.7] it's clear that the EEOC has authority to institute class litigation and there's no need for it to satisfy the standard Rule 23 of a private plaintiff.

The second time the Court had an opportunity to look at a major case, that the Court had an opportunity to look at the reach of the EEOC and its ability to litigate was in *EEOC v. Occidental*. At issue in that case was whether -- there's 180 days provision in the statute, whether that provision required that the EEOC had to file its lawsuit within 180 days or it lost jurisdiction over the charge, and, secondly, whether the EEOC was going to be treated similarly as a private plaintiff in a state cause of action and be subject to the same statutes of limitations.

And again the Supreme Court said, "We are not going to limit the reach of the EEOC as a litigator in federal court."

The last time the court had an opportunity to look at the EEOC's role in judicial enforcement was in 2002 with *EEOC v. Waffle House*. In that case at issue was a private arbitration agreement between the employee and the employer that mandated that any disputes would be settled by binding arbitration.

The EEOC, who was not a party to that [p.8] proceeding, filed a lawsuit seeking both injunctive relief -- which was one of those amendments that came in 1972. Prior to 1972 courts were fairly limited to back pay and maybe a small amount of injunctive relief. With the amendments in 1972, the reach of what a court could do to help a workplace be free of discrimination became broader.

In *Waffle House* the employer tried to stop the proceeding, saying that the EEOC could not litigate because of the arbitration agreement. The Fourth Circuit had agreed and said that -- and found that the

reasons underlying the Federal Arbitration Act outweighed the EEOC's right to proceed in federal court.

The Supreme Court in *Waffle House* disagreed and held that an arbitration agreement did not bar the EEOC from seeking -- from litigating and, in fact, did not bar the EEOC from seeking specific victim relief for the victim. So the EEOC would not be limited only to seeking injunctive relief.

In that case, and, again, this is just three, four years ago, the Supreme Court said that once a charge has been filed it is the EEOC that is in charge, that is -- decides what's going to happen in that process

[p.9] According to the Supreme Court, Title VII makes the EEOC master of its own case. And the court went on to say that it is the EEOC, not the charging party, not the employer, and not the courts that grants -- that is given the authority to decide what the public interest is at stake with any specific charge.

That brings us to the charge that's at issue here. It's a charge filed by Tyrone Merritt, an employee of FedEx. In his charge Mr. Merritt alleged that he and a class of other African-American employees and Latinos had been discriminated against as a class in both promotions, in general promotions to basically entry-level positions, and that respondent uses a basic skills test which has a significant adverse impact on those employees. They have to take the test before they can be -- and pass before they can be eligible for these entry-level positions.

He also alleged in his charge that he and other African-Americans and Latinos were also being discriminated against classwide in discipline, in promotions, in evaluations, in compensations.

Although Mr. Merritt chose to become a class member in a lawsuit that is currently working its way, [p.10] I think it's out of San Francisco and it involves FedEx and their operations in 11 of the western states, he chose to become a member of that proceeding. The EEOC, however, concluded that the public's interest in this matter and what this employer was doing nationwide was important enough because it operates in every single -- I think it operates in every single state, that the EEOC when it issued Mr. Merritt a Notice of Right to Sue, as our governing regulations permit, we notified both Mr. Merritt and the respondent that we had determined that it was in the best interests of Title VII that the EEOC continue to investigate Mr. Merritt's -- the allegations contained in Mr. Merritt's charge.

And that's why we're here today, Your Honor, because the EEOC, as the Supreme Court has said we are authorized to do, we decided that the allegations raised in Mr. Merritt's charge were important enough that nothing should prevent the EEOC from looking into those allegations. We were determined to do that, we issued a subpoena in order to be able to get some basic information that would allow us to start our investigation.

As it turns out, this respondent, FedEx, was equally determined to make sure that we not look at [p.11] how it's operating.

And respondent has contended that this Court is bound by the decision in the Fifth Circuit in *EEOC v. Hearst*. All the Court has to do is look at the Ninth Circuit to know that respondent is mistaken.

The dispositive law in this case is *EEOC v. Children's Medical Hospital*. In that case at issue was the ability of the EEOC to investigate allegations of discrimination in a case where the employer and other private plaintiffs had resolved a lawsuit and entered into a consent decree.

And the court held in *EEOC v. Children's Hospital* that the consent decree in that private class action did not bar the EEOC from investigating allegations of discrimination. The court also said that whether the EEOC might be able to file its own action subsequently or whether there might be any effects, *res judicata* effects, from the consent decree and what had gone on in that proceeding, that was not an appropriate issue for the court to be deciding at that time.

The Ninth Circuit said that for a subpoena to be enforceable only three things are required. First, the subpoena has to be within the agency's authority; secondly, the agency, the EEOC, has to satisfy its own [p.12] procedural requirements, whatever those might be; and, lastly, that the information that was sought had to be relevant to the claims in the charge.

Certainly in this case the subpoena is within the authority of the EEOC. Mr. Merritt has filed a charge alleging discrimination on behalf of African-Americans and Latinos. He has filed a charge that is broad enough that it raises the specter, the potential of

nationwide pattern and practice of discrimination against these two protected groups.

The EEOC satisfied its procedural requirements that are really pretty basic. There has to be enough information on the charge to give respondent fair notice of what the allegations are. In this case there was a charge with an -- you know, the charge says see the attached sheet and it's an entire page that lists allegations.

The EEOC has to serve notice of the charge, that includes an actual notice as well as the charge, on the respondent within 10 days.

And then with regard to whether this information is relevant or not, Congress gave the EEOC incredibly broad range of authority to investigate when you look at the Act. It gave the Commission access to any information that might possibly be [p.13] relevant.

And the information that's sought in this subpoena is undeniably relevant. It's a very basic request that the Commission uses Commission-wide when it's a large company or we believe that there's going to be a lot of electronically kept personnel records. It makes it so much easier for us to conduct our investigation.

So there was only one request in the subpoena. And that basically asks the respondent, asked FedEx, tell us how you maintain these computerized machine-readable files and give us a little bit more information about that.

This specific request, I think it's the Fourth Circuit, or could be the Fifth Circuit, but it's *EEOC v.*

Lockheed. In that case the Court said of course this is a reasonable request, it's a relevant request, because it would allow the EEOC to further tailor subsequent requests knowing how this employer maintains its records.

But nonetheless FedEx refused to tell us how they maintain their records, and they rely on *EEOC v. Hearst*, and they argue that EEOC has been divested of any power to enforce this subpoena or to investigate because Mr. Merritt has become a part of this class [p.14] action. In other words, implicit in that argument is that the respondent is arguing that there's no longer a valid charge that would allow the EEOC to continue its investigation.

What that means, Your Honor, is that under *Hearst* there's really a fourth requirement, a fourth criteria, in addition. to the charge, satisfying the EEOC's procedural requirements, and the evidence being relevant, there's an additional criteria, and that is that whoever brought forth the complaint, the initial complaint, has not requested a Notice of Right to Sue end gone into court.

Nothing in Title VII requires that conclusion. Certainly after the amendments nothing requires it. That position ignores totally the role that Congress envisioned for the EEOC to play in trying to make sure that discrimination in the workplace will be at some point something that's only heard of and talked about in the past.

It ignores the Supreme Court's statements and holding in *EEOC v. Waffle House*. The EEOC is supposed to be the master of its own cases, it is

supposed to be able to decide how a charge is going to be handled.

In this case the EEOC did what it was [p.15] authorized to do it. It looked at the public interest, it looked at what the allegations were, and it decided that, yes, Mr. Merritt should, if he wanted to, be able to join in the class action that was going on for the 11 states, but that the EEOC, because of the public's interest at stake, would be allowed to investigate.

It also ignores the fact that Title VII envisions that the EEOC may be able to obtain voluntary compliance through a conciliation agreement or some other method. In order to decide who has been wronged we have to get initial -- we have to get information about the employer's practices, procedures, who has failed this basic skills test, who has applied for these positions, who was selected. We have an opportunity to look at their comparative qualifications.

In *Hearst* and in -- the respondent has also suggested that the EEOC is free to initiate an enforcement action in federal court, what it can't do is investigate any longer. And I'm sure that the Court has either already looked at *EEOC v. Hearst* or will. It is one of the -- in my opinion, it's one of the must results-driven cases I have ever seen. It was clear that the Fifth Circuit didn't like its own [p.16] precedent in the Fifth Circuit regarding whether after 180 days the EEOC lost jurisdiction over a charge and had to stop investigating.

So in the end the court in Hearst reached the decision that it had wanted it to. It said after Notice of Right to Sue was issued, which is mandatory that we

issue it after 180 days if it's requested, and the charging party, the plaintiff, goes into court, then we no longer can investigate. But the Court said of course we're free to litigate if we want.

The problem with that suggestion is that Title VII has a very specific statutory scheme. Before the EEOC can file a lawsuit it has to have a charge, it has to investigate, it has to make a reasonable cause determination, that's just a finding made by the director that more likely than not discrimination has occurred in the workplace and then it has to make good faith efforts to conciliate the charge. All of those things have to be done before the EEOC can file a lawsuit.

Clearly all of those steps are not only interdependent on each other, but they build on each other. If the EEOC has to conciliate before it can file a lawsuit, it has to issue a reasonable cause finding. Before it can issue a reasonable cause [p.17] finding, it has to conduct an investigation.

So the *Hearst* court's suggestion that the EEOC can't investigate anymore but it's free to file a lawsuit, in actuality, if the EEOC loses its ability to investigate a charge, it really cannot litigate.

So in this case the bottom line is, if the EEOC can't investigate, it can't do all of the things that's necessary for it to try to right a potential wrong.

At this point we really don't know if there is discrimination. There is some strong evidence regarding some district impact of the basic skills test, but we have not conducted a thorough investigation

because this respondent has thwarted us at the first step of trying to do so.

And lastly, Your Honor, I said there were three reasons, and I've talked about it before, the defendant has cited three cases. One is *Hearst*, one is an published district court case that chose to follow *Hearst*, the other one is a, I think it's District of Virginia case that thought *Hearst* was extremely well-reasoned, and all three of those cases rely on what I believe is faulty reasoning in light of the 1972 amendments and certainly in light of what Congress has -- or I'm sorry, the Supreme Court has [p.18] been consistently ruling with regards to how far and what the reach of the EEOC will be in judicial enforcement actions.

Thank you.

THE COURT: Thank you.

Mr. Stolkin.

MR. STOLKIN: Thank you, Your Honor.

For about 20 minutes the EEOC spent much of it giving a history of Title VII and a lot of things that it can do, which we're not here to dispute. The issue before Your Honor right now is an extremely narrow issue and it boils down to whether the EEOC can investigate, including issuing and enforcing a subpoena, after it issued a Right to Sue letter and after a party has sought to enforce his rights to private litigation.

What is not before the Court is whether the EEOC has broad investigative powers when it does have jurisdiction to investigate, whether the EEOC can intervene in a lawsuit, whether the EEOC can file its own lawsuit, whether the EEOC can file a class lawsuit, whether the EEOC is bound by state statutes of limitation, how reasonable their subpoena is in this case, or what it can do or can't do within 180 days after a charge is filed, and what it can and [p.19] can't do after 180 days has expired.

And I mention what this is not about only to emphasize the fact that that's pretty much what the EEOC gave you in its opening salvo. There are a lot of things they can do, they just don't apply here. I think the EEOC did a pretty good job trying to create a silk purse out of a sow's ear, but that's not what we're here about.

The EEOC mentioned this class action lawsuit. Let me just give the Court the name so we know. It's called *Satchell, et al. v. FedEx*, and I'll refer to the *Satchell* plaintiffs or *Satchell* attorneys as I'm addressing Your Honor.

I do want to tell the Court there are some facts not in dispute, and I think this chronology is important.

On November 27, Tyrone Merritt filed his original Charge of Discrimination. Turns out it was an untimely Charge of Discrimination. There were some thing that's happened in between, but in late June, early July of 2005 Mr. Merritt amended his charge or filed a supplemental charge.

On October 6, 2005, the *Satchell* plaintiffs told the EEOC that their class had been certified in the action pending in the Northern District of [p.20] California and they specifically requested a Right to Sue letter for Mr. Merritt.

On October 12, 2005, Mr. Merritt joined the class action lawsuit.

On October 20, 2005, the EEOC issued a Right to Sue letter, choosing, I might add, not to hold the charge to continue to investigate at that time, notwithstanding what they say the reg says. They let go of that charge and Mr. Merritt proceeded in his lawsuit, or as one of many plaintiffs in that lawsuit.

Four months later, on February 10, 2006, the EEOC issued the subpoena that we're here talking about today. FedEx petitioned the EEOC, as it has a statutory right to do, to revoke or modify that subpoena. The EEOC denied that request, and on June 1 they filed this enforcement action.

Those facts are not in dispute and counsel would tell you, like I do, we're really not fighting about the facts.

I don't know if Your Honor has heard of a principle called Occam's Razor, but I thought it was particularly applicable to this case. Occan's Razor was a principle that was actually developed either out of philosophy or science, depending on what you read in the history books, in the 14th Century, but has [p.21] come through time to be translated to mean all things being equal the most simple explanation is probably the correct explanation.

The Occam's Razor principle applies here because the simple explanation is laid out on all fours in the *Hearst* case, which is why the EEOC clearly is spending a lot of time saying please ignore this case.

the EEOC states we've only cited to Your Honor three cases. Yes, we cited the *Hearst Corporation* case, which is on all fours with this case. We cited Your Honor to *EEOC v. Federal Home Loan Mortgage Corp*, and we cited Your Honor to an unpublished decision out of the Southern District of California that relied on *Hearst* and denied EEOC enforcement of a subpoena after a Right to Sue letter had been issued and litigation commenced by the individual involved, and that was *EEOC v. Home Depot*.

What's interesting, while we're being criticized for citing Your Honor to only three cases, EEOC has not cited one case that is on all fours with the issue before you today.

Instead what we're looking at is the EEOC is trying to force a square peg into a round hole and making circular arguments and mental gymnastics with [p.22] cases and saying it says this is, it must mean, that and this is what you should draw the conclusion, or what the conclusion is you should draw.

EEOC is a lot bigger law firm than FedEx or Fennemore Craig, and if there had been a case somewhere in this country, I think that they would have found it.

THE COURT: It might be a bigger law firm, but your firm is more well paid.

MR. STOLKIN: I don't know. I don't know. I have a friend on the bench, Your Honor, who reminds me constantly that at least what he gets paid on an hourly basis is a pretty good rate.

THE COURT: He's working less hours than I am, then.

MR. STOLKIN: And he laughs about it, yes. I won't mention his name.

THE COURT: That's fine.

MR. STOLKIN: I'd like to talk a little bit about *Hearst* right now because it is on all fours with this case, and I want to address the Court to one of the arguments and basically the main argument the EEOC makes.

Well, there are two main arguments. The first one I'm going to dispose of by saying I'm not [p.23] prepared and I don't know how counsel has the insight to question the motives of the Fifth Circuit. I read the case, I have no knowledge whatsoever that the Fifth Circuit engaged in any kind of conduct that was unprofessional or results-oriented to get to a decision that was somehow entitled to less deference than any other circuit court precedent.

The second argument is that they cite the Court to the case of *Newton v. Thomason*, presumably for the principle that this Court should ignore the Fifth Circuit case because the only authority you're to follow is out of the Ninth Circuit and the U.S. Supreme Court, which is a bit of a misstatement of *Newton v. Thomason*.

THE COURT: I am supposed to follow the U.S. Supreme Court, aren't I? Don't they trump -- don't they trump any circuit?

MR. STOLKIN: Well, they do, but I've been in situations in the Ninth Circuit where sometimes they disagree with their brethren on the high court.

THE COURT: And they usually get slapped down when they do.

MR. STOLKIN: They do. They do.

Newton v. Thomason was a little bit different, though, Your Honor. It was a Lanham Act [p.24] case, involving I think it was Larry Thomason, the gentleman who had given former President Clinton his lines, and it was an unfair competition action that originated in the Northern District of Illinois and ended up in the Northern District of California of all places, and the issue as it related to the federal claim, if you check this case, is that where Seventh Circuit law differs from Ninth Circuit law on a federal question, then district courts in the Ninth Circuit should follow Ninth Circuit law.

It does not say that cases from other circuits should be ignored, which would be a very disingenuous argument. I know that this Court has followed decisions from other circuits, including the Fifth Circuit, as have courts of judges all over the country.

There are three parts of *Hearst* I want to concentrate on. They are quotes. Please bear with me because there's a point where I'm going with this.

THE COURT: Okay.

MR. STOLKIN: First, "Congress granted EEOC broad investigative authority so that the agency promptly and effectively could determine whether Title VII had been violated and to assist the agency in its efforts to resolve disputes without formal [p.25] litigation. These purposes are no longer served once formal litigation is commenced. Instead, if the EEOC has any further interest it may intervene and pursue discovery through the courts, or, if its interest extends beyond the private party charge upon which it's acting it may file a commissioner's charge."

They are not mutually exclusive provisions is what this is saying. Counsel would have had you believe that, gosh, we can't do anything if we're not allowed to enforce this subpoena.

As the Supreme Court in *Occidental* said, this is a multi-phrase process. There's an investigative stage, then there's an enforcement stage in the courts. Once you've left the investigative stage and it's in the courts, the investigation stage is over.

Let me continue.

The case before us is not controlled by *Occidental*, and skipping on in the quote, "The charging parties have moved their claims into the litigation stage. They not only affirmatively requested their Right to Sue notices, but instituted a civil action against *Hearst* based upon the exact acts alleged in their charges and accompanying affidavits. The alternative enforcement procedure identified by the court in *Occidental* has begun and the time for [p.26] investigation based upon

Lamb's and Wadell's charges has passed." That's the end of that quote.

The last quote is *Hearst* continuing, "We hold that in a case where the charging party has requested and received a Right to Sue Notice and is engaged in a civil action that is based upon the conduct alleged in the charge filed with the EEOC, that charge no longer provides a basis for EEOC investigation. Nothing in this opinion should be construed as holding that the EEOC may not seek the same information that it seeks in these subpoenas so long as it is on the basis of a different individual charge or a commissioner charge."

Now, that last quote leads into the next thing I want to point out to the Court. We aren't here to litigate this, but I think it puts something in context. I think it also explains that notwithstanding putting on a brave face here today, I don't think that the EEOC truly believes it has jurisdiction to enforce the subpoena, and here's why.

The EEOC followed the recommendation given by Fifth Circuit, and that is a new charge was filed. And I'm going to give you the name. It's a man by the name of Paul Chiket (ph.). And there's a little chronology to this side road that I'm going to take.

As I pointed out, on February 10 the EEOC [p.27] issued its subpoenas and we petitioned to revoke or modify them, which was denied and on June 1 this action was filed.

What happened next is what's interesting. On June 7, 2006, the EEOC in an email to the *Satchell* plaintiffs' attorneys asked them if there were any

other charges in the Ninth Circuit they wanted to become aware of.

On July 8, 2006, the *Satchell* plaintiffs informed the EEOC that they were going to be filing a charge by naming Paul Chiket of the basic skills test, which is at the heart of this subpoena.

On July 31, 2006, Paul Chiket signs his Charge of Discrimination, which I'd like to put in the record. It was charge No. 540-2006-03742, which relates exclusively to allegations of discrimination, race discrimination regard to the FedEx basic skills test.

Last Monday, a week ago today, EEOC served on FedEx a subpoena related to the Chiket charge seeking exactly the same information and documents that are sought in the subpoena that we're talking about today. The EEOC is doing what the Ninth -- excuse me, the Fifth Circuit said they should do. If you want that information and there's another charge, you can [p.28] seek it in that charge.

Excuse me a minute.

In anticipation of what I'm going to hear in reply, I will tell the Court two things have happened since then. Number one, the FedEx attorneys in-house in Tennessee contacted the investigator with the Phoenix district office, and they are going to try to work out some resolution about the scope of the subpoena, but because there is a very short leash on them as to when they can file a petition to revoke or modify, which is only five days, they did file a petition to revoke or modify, but a letter has been sent to the EEOC explaining this is basically covering their procedural

rear end and that they want to cooperate, and they are not contesting the EEOC did not have jurisdiction to issue that subpoena.

THE COURT: You're not saying they're making a molehill out of a mountain, are you, or a mountain out of a molehill, however you folks say that?

MR. STOLKIN: It may be. I don't know if there's a principle of law attempted here or if it's really an attempt to seek information, as counsel has suggested.

THE COURT: Maybe they're trying to get you to the Supreme Court.

[p.29] MR. STOLKIN: Again.

THE COURT: Argument there.

MR. STOLKIN: Again. Again. But you asked a very interesting question, Your Honor, because much of the information the EEOC seeks it already has. The *Satchell* litigation began I believe sometime in 2003, and, as I said, it was November of '04 when Merritt filed this charge.

On June 21, 2005, the EEOC, which has been working in harmony with the plaintiffs' attorneys in the *Satchell* case, received from those plaintiffs' attorneys depositions, expert reports, although not the basic skills test itself, but they received a bunch of information.

After Mr. Merritt amended his charge in late June, early July, the investigator on that case, on this particular subpoena, a man by the name of Jeremy

Yubeta, Y-U-B-E-T-A, asked for the basic skills test. Discussions went on and letters between Mr. Yubeta and the FedEx attorneys in their home legal office. And FedEx responded with a letter on July 19 offering to provide the validation studies in response to the request for the test itself because the validation studies are the most important factor, not the test itself.

[p.30] On July 26 Mr. Yubeta wrote back and agreed that the validation studies are what he wanted and needed.

On August 3, 2005, FedEx provided the validation studies.

EEOC has information now from the actual lawsuit through the plaintiffs' attorneys and the validation studies that were provided by FedEx. FedEx, contrary to counsel's comment, has not been withholding information. Just because somebody may disagree with the scope of the EEOC's authority or the scope of a subpoena doesn't mean anybody is stonewalling anybody. And if that impression was intended to be created, and I'm not sure it was, I'd like to dispute it.

The EEOC incorrectly believes that it has plenary authority to investigate. In other words, it isn't bound by anything. It's our position that they really turn the statute on its head because the EEOC's authority emanates from the statute itself. It is either given or it's not.

The EEOC takes the position, well, if we're not specifically prohibited from doing it, the sky is the limit. Hence their argument taking *Waffle House*, a

completely irrelevant case, saying we're the masters [p.31] our of our own destiny, we can do whatever we want, which isn't what *Waffle House* said, as I'll point out in a minute.

The statute, while it gives them broad investigative authority to determine if Title VII has been violated and to assist the agency in conciliating if they find that it has, doesn't allow the EEOC to continue once the investigation phase has closed.

Intervention is a real source of getting information. The difference is that the EEOC operates under the rules of the court and the Federal Rules of Civil Procedure, not under the EEOC's own rule. They don't get to be judge, jury and executioner. They abide by another authority.

EEOC v. Occidental Life, which was the '76 Ninth Circuit case, stated, and I quote, Should such private action be filed, the EEOC would apparently be restricted to intervention, close quote.

Title VII itself says there should not be dual proceedings, you should not have a lawsuit proceeding and an investigation going on at the same time about the same charge that you're seeking to enforce in the court.

The right to investigation ends when litigation commences. The cases say it, the statute [p.32] says it, the legislative history that we've cited to the Court says it, and even on portions of the '72 Act that may not have been enacted, district courts have recognized that even though that wasn't enacted, the principle remains, no dual proceedings.

THE COURT: Let me ask you this while it's on my mind.

EEOC says the *Satchell* lawsuit only involves 11 states. They're investigating for the other 39; if my math is correct. What do you say about that? How does that play into it?

MR. STOLKIN: They're correct, it involves the western states and the EEOC is not investigating for the others. This is an individual charge by Mr. Merritt. Yes, he says in the charge for a class of individuals, but when the EEOC let go of that charge and stopped investigating, it can do one of two things, just as counsel said. It can't intervene in the existing lawsuit, which is regional. It could issue a new charge, incidentally, which it has done, because the Chiket charge also is based on a class of individuals. It could file a commissioner's charge. It can file its own lawsuit.

It isn't a question of what the EEOC has the power to do. It is about whether they can enforce a [p.33] subpoena that it no longer has jurisdiction to enforce because it issued a Right to Sue letter, said, 'bye, 'bye, out the door, and go ahead and litigate your case.

THE COURT: They claim they reserved the right to continue investigating when they issued the Right to Sue letter.

MR. STOLKIN: They did.

THE COURT: They claim that they did. You say they don't have that right whether they claim it or not.

MR. STOLKIN: Yes, that's correct, Your Honor. We claim that they do not. And we claim that the regulation is invalid and we claim that the authority that they site in support of it doesn't support that claim at all, and on top of that what the EEOC is trying to do today even violates their own compliance manual, which I will point out to the Court.

Let me talk a little bit about the EEOC's cases. Most of the cases they cited in their opening brief I'm not going to address because the important ones come up in the reply, but I'll be starting at page 12 of their opening brief. I think there were 11 cases cited, none of which relate to the issue before [p.34] this court. All of them are let's-shove-a-square-peg-into-a-round-hole argument. Let's talk about the cases they cite and try to turn into.

They cite a case called *EEOC v. Karuk Tribe Housing Authority* for the proposition that you only realize that we can't investigate and issue subpoenas in a case in which we don't have jurisdiction, but since we declare we do have jurisdiction, *Karuk* stands for the proposition our subpoena is enforceable.

That's not what *Karuk* says at all. *Karuk* recognizes if you don't have jurisdiction you can't issue a subpoena and you can't put a party through responding to that subpoena, but what it also says is, and I'm quoting, "Questions of jurisdiction are properly addressed at the subpoena enforcement stage," which is what we're doing here today.

Interestingly, EEOC stated to Your Honor that the *Children's Hospital Medical Center* case out of the Ninth Circuit is the case that's dispositive of this issue.

They didn't state that in their opening memo and, in fact, cited *Children's Hospital* only for the standard of what they have to do to enforce a subpoena, which are the steps that counsel went through about relevance and breadth, etc.

[p.35] Actually, *Children's Hospital,* two things. Their argument misstates what we said. We did not say that the only choices are investigation, conciliation by an EEOC or litigation by the private party. We do state, in our quote from *Children's Hospital,* the alternative scenario is a suit by the Commission or the charging party.

It also ignores the fact that once the charging party brings a lawsuit EEOC doesn't have authority to issue a subpoena anymore.

And in that regard we refer the Court to *Pacific Press*, the *EEOC v. Pacific Press*, Ninth Circuit 1976 case, which states that the initiation of a private action based on the charge signaled failure of efforts at conciliation and terminated EEOC'S opportunity to bring suit. The parties no longer looked to the EEOC for relief but instead shifted their attention to the court.

I'm not saying that's on all fours like *Hearst*, but we think it's an evidence that the Ninth Circuit also recognizes there comes a point of finality in the EEOC's investigation.

EEOC relies heavily on the Supreme Court case of *Occidental Life of California v. EEOC*, and we really don't understand why. That was a case where [p.36] Occidental -- or, excuse me, the EEOC filed a sex

discrimination lawsuit against Occidental, but no private party had filed a suit and the employer challenged only the length of the enforcement state, not whether the enforcement action terminated the investigative stage. And, in fact, if you read *Hearst*, it specifically addressed *Occidental* and found it doesn't control and doesn't relate to a situation where we're talking about the EEOC trying to continue an investigation after its issued a Right to Sue letter and the private party has gone into litigation to enforce his or her rights.

EEOC cites the *Waffle House* case. *Waffle House* held that an employee cannot contract away the EEOC's right to enforce Title VII by seeking relief for the worker by filing a lawsuit. All *Waffle House* said wasn't -- yes, there's a quote about the EEOC controlling their own charge and they can't be bound by a private party's arbitration agreement, which precludes the EEOC from bringing a lawsuit. It in no way, shape or form addresses the issue about whether or not the EEOC, once it has issued a Right to Sue letter and the private party has indeed litigated, can enforce a subpoena. Square peg, round hole.

EEOC cites *General Telephone Company of the* [p.37] *Northwest v. EEOC* for the proposition that they can bring a class action on behalf of FedEx employees outside the western region, which addresses the question Your Honor just asked me. We aren't even disputing that. It's not relevant to this action. If the EEOC wants to bring a class action for employees outside the western region, they can do it. And what happens in that case and how other -- or whether or not it's enforced and effective will be decided in a court somewhere else at a different time.

THE COURT: I'm glad you said somewhere else.

MR. STOLKIN: Probably won't be in Tucson.

The regulation which they wish could have deference and was also addressed in the *Martini* case that we cited to the Court is simply invalid. The one that says the EEOC can continue to process a charge, which is -- excuse me just a minute -- 29 CFR 1601.28A3, that's the one that *Martini* held was invalid.

But one of the things that I would like to point out to the Court, even if we were to assume any validity to that regulation, the EEOC itself says it only applies it -- and right now I'll looking at the EEOC's compliance manual, Section 6.4, continued processing after notice of right to sue is issued. [p.38] Continued processing the charge after issuing the NRTS whenever a cause letter of determination has been issued.

There's no cause letter of determination in this case. The investigation stopped. And I have a copy if the Court wants it or I can give it to Your Honor's law clerk when we finish here.

Let me also address this argument that the EEOC says, gosh, we can't even intervene until we've investigated and conciliated.

We actually have two cases here which we can also provide because as we were going through the EEOC's reply it dawned on us that they may come up with that argument. One case is very interesting.

Pardon me.

It was a case out of the Northern District of California again called *Mills v. Bartenders International Union Local No. 41*, and the cite is the Westlaw cite, 1975 WL 3623. Basically it's interesting that I'm hearing today that the EEOC says we can't intervene until we've had a chance to finish our investigation, when --

THE COURT: I'm not sure they saying they can't, I think they're saying it doesn't make sense.

MR. STOLKIN: Then I misunderstood the [p.39] argument. But *Mills* they made the exact opposite, we don't have to conciliate a claim before we intervene. That was what the Mills said.

That was the same thing that happened in another case out of, I think it was the Southern District of New York called *Sobel*, S-O-B-E-L, *v. Yeshiva University*, 438 F. Supp. 625.

So if the EEOC wants to intervene, which was what -- which is what the statute says, what we believe the cases say, what *Hearst* clearly says, what the unpublished Southern District of California *Home Depot* case said and what the -- I can't remember the other case we cited to Your Honor now, they can intervene. And that's what should be done.

Is this a mountain out of the a molehill since they have the information and they have issued a new -- the exact same subpoena in the Chiket charge? I guess only the EEOC can answer that question. But I really wonder why we're here doing this, and with the EEOC I think recognizing that it does not have the jurisdiction to do what it's seeking to do.

Thank you.

THE COURT: Thank you.

MS. PADEGIMAS: Gee, I'm not exactly sure where to start, Your Honor. We've had silk purses out [p.40] of sow's ears, mountains out of molehills, trying to put square pegs into round holes, 14th Century axioms.

What we haven't really heard here, Your Honor, however, is anywhere that Title VII says the EEOC is divested of jurisdiction to investigate once a Notice of Right to Sue is issued and a charging party goes into court. Had there been a provision like that in Title VII, it would have been cited to in respondent's brief. It is not there.

THE COURT: Well, they cite to it by the way of that *Hearst* case.

MS. PADEGIMAS: By way of *Hearst*. Let's just go back to *Hearst* for a minute, Your Honor.

In *Hearst* when I said I thought it was a results-driven test, results-driven opinion, just look at *Hearst*. They talk about how limited the EEOC's abilities to investigate should be. More than half of that opinion is disagreeing with their own precedent and that of the Supreme Court.

In *Hearst*, it's a fact that Mr. Stolkin's reminded me of, in *Hearst* actually the EEOC would not have been able to intervene, I do not believe, because the charging parties in *Hearst* did not file Title VII actions. They filed some other actions based on the [p.41] underlying facts that they had alleged in their Title

VII charge. So there was no Title VII proceeding going on in court when the *Hearst* court decided the EEOC's ability to investigate had cut off.

THE COURT: Did you guys appeal that decision to the Supreme Court?

MS. PADEGIMAS: You know, I don't know whether we did or not, so I honestly, I'm not out of appellate, I don't get to make those kinds of decisions. Sometimes I get to fight with them what we ought to be doing, but I don't know what we did or did not do in that case.

THE COURT: Back to this case, why not just file an intervention and be done with it?

MS. PADEGIMAS: There's a couple of reasons, Your Honor, why not to file intervention or just to go into intervention. We really would be fighting whether we can go after the entire -- the 39 other states. That's one issue. It would be an issue that would be heavily litigated. I can imagine me issuing a request for production, a request -- interrogatories. My best guess is I would be in court over and over again on motions to compel, and in my experience --

THE COURT: I don't know about over and over, [p.42] but eventually somebody --

MS. PADEGIMAS: I would like to think that, but in my experience I think that actually I'm able to get more information before I go into litigation than I can after, once I'm under the federal laws of discovery.

There's another -- there's also another issue. I mean, if we were to intervene, the defendant is saying

that the -- what's at the heart of Mr. Merritt's allegations are simply the basic skills test. That's not what's at issue, Your Honor, not just that. He has claimed promotions, evaluations, compensation, a wide range of issues.

If the EEOC loses jurisdiction on a charge that it may have had in its inventory because of a Notice of Right to Sue, if it's not a pattern and practice case, and very often our cases involve allegations of both pattern and practice as well as individuals because we don't have enough evidence to be pattern and practice, under *EEOC v. Alioto*, we are only able to go back 300 days to try to make whole victims of discrimination.

So even though there has been a new charge filed this August and there is -- it's two years -- I can't remember Mr. Merritt's exact date, but it's two [p.43] years past that I think approximately, we would lose all of those victims that would be timely under Mr. Merritt's charge.

And while defendant, or respondent is suggesting that what is meant by the EEOC's regulation regarding being able to continue to investigate and using the compliance manual, that's not the case. The regulation does not premise anything on what we can or cannot do after a cause finding. The regulation simply says that the issuance of a Notice of Right to Sue shall terminate the process except in a commissioner's charge or if the EEOC has determined that the purpose of Title VII or the ADA, which adopts Title VII, would be effectuated to further process the charge. And then issuance of the Notice of Right to Sue shall not terminate the processing of a commissioner charge.

Mr. Stolkin said over and over again that when we issued the Notice of Right to Sue we stopped processing the charge. We have never stopped processing the charge. Exhibit 4 to our opening brief states -- it's the notice of the right to sue, and it says that we're going to continue to process the charge, which we have tried to do.

And although Mr. Stolkin told the Court that [p.44] the respondent had filed basically a protective petition to revoke or modify, he also told me that they had -- that the respondent had some concerns over the breadth of the subpoena, which subpoena was pretty basic. I don't know what --

THE COURT: One person's basic can be another person's breadth. That's not necessarily unheard of.

MS. PADEGIMAS: I guess it certainly is, can be.

Mr. Stolkin also said that Mr. Merritt's charge was untimely. It was --

THE COURT: That's of no moment at this point.

MS. PADEGIMAS: It was not untimely.

And with regard to whether the --

THE COURT: That's something Northern California can worry about, not me.

MS. PADEGIMAS: There were enough allegations in Mr. Merritt's charge beyond the basic skills test, but what *Children's Hospital* specifically says, that unless

it is clear that there is no jurisdiction, the subpoena should be enforced.

Title VII does not say that the EEOC loses jurisdiction and its enforcement investigative authority with the issuance of a Right to Sue and [p.45] proceedings. Title VII doesn't say that, it's silent, Congress was silent on it. The Commission's regulations should be given deference.

Mr. Stolkin has said that -- you know, that there is no case, we have been able to cite no case out there that's on all fours the way *Hearst* is. And he's absolutely right, and I think the reason for that, Your Honor, is that *Hearst* is an aberration.

I've been an EEOC attorney for 19 years. Until now I had never heard of *Hearst* and couldn't believe that the holding was as it was in *Hearst*. That is because it's an aberration. It's not in keeping with the Congressional intent evinced in the 1972 amendments and what the Supreme Court has had to say. And I will point out that the *Hearst* decision is before the decision in *Waffle House*.

THE COURT: I noted that. *Hearst* was '97, *Waffle House* is 2002.

MS. PADEGIMAS: Yes. And I'm just going to speak briefly just about *Pacific Press*. That is the case where the court said that, yes, the EEOC could not seek an injunctive -- preliminary injunctive relief, and in that case there was a charge, there had been a Notice of Right to Sue issued on that charge, processing had stopped on that charge, and the [p.46] charging parties, the claimants, went into court. Subsequently

they filed retaliation charges and the EEOC sought to join the plaintiffs in seeking injunctive relief.

Normally when we seek injunctive relief, and as that the court noted, it's before -- we're seeking before our processing is complete because the irreparable harm very often is to our process. Retaliation has a chilling effect on other potential victims and witnesses.

In that case the court noted that we had stopped processing the charge, therefore, we could not go in to seek relief, preliminary relief.

And with that said, Your Honor, I will just once again comment that there is nothing in Title VII that restricts the EEOC's ability to investigate Mr. Merritt's charge. Had Congress wanted to do -- limit the EEOC's ability, they certainly could have said so when they were amending the statute. Every time since those 72 amendments that the court has had an opportunity to look at this -- and, granted, they haven't looked at this issue because, as I've commented, I think *Hearst* is an aberration. but every time they've had any opportunity to look at how the EEOC manages its cases, the Supreme Court has done [p.47] nothing to limit our reach in federal district court.

THE COURT: All right. Thank you both very much. I'll take a look at the pleadings again and read a couple of cases that you both talked about, particularly the *Hearst* case. It will be interesting to see if *Waffle House* even cites *Hearst*.

MS. PADEGIMAS: I'm pretty sure it doesn't.

THE COURT: Thanks a lot.

(Court recessed at 12:02 p.m.)

[p.48] CERTIFICATE

I, Bonnie J. Brunotte, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Bonnie J. Brunotte — 10/11/06
Official Court Reporter — Date

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Nos. C03-02659 SI; C03-02878 SI

[Filed April 9, 2007]

DERRICK SATCHELL, KALINI BOYKIN, VALERIE BROWN, RICK GONZALES, CYNTHIA GUERRERO, RACHEL HUTCHINS, TYRONE MERRITT, KELVIN SMITH, SR., and KEN STEVENSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

FEDEX EXPRESS, a Delaware Corporation,

Defendant.

CLASS ACTION

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ORDER: (1) PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT; (2) PROVISIONALLY CERTIFYING SETTLEMENT CLASSES; (3) DIRECTING DISTRIBUTION OF

NOTICE OF THE SETTLEMENT; AND (4) SETTING A SCHEDULE FOR THE FINAL SETTLEMENT APPROVAL PROCESS; MEMORANDUM IN SUPPORT THEREOF.

DATE: April 13, 2007
TIME: 3:30 PM
PLACE: Courtroom 10, 19th Floor
JUDGE: Hon. Susan Illston

James M. Finberg (SBN 114850)
Eve H. Cervantez (SBN 164709)
Rebekah B. Evenson (SBN 207825)
Danielle E. Leonard (SBN 218201)
Claire Prestel (SBN 235649)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

Kelly M. Dermody (SBN 171716)
Daniel E. Barenbaum (SBN 209261)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Todd M. Schneider (SBN 158253)
Guy B. Wallace (SBN 176151)
SCHNEIDER & WALLACE
180 Montgomery Street, Suite 2000
San Francisco, CA 94104

Telephone: (415) 421-7100
Facsimile: (415) 421-7105

KAY MCKENZIE PARKER
225 Bush Street, 16th Floor
San Francisco, CA 94104
Telephone: (415) 227-9622
Facsimile: (415) 227-4522

Additional counsel appear on last page.

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on April 13, 2007, at 3:30 p.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Susan Illston, located at 450 Golden Gate Avenue, San Francisco, California, the plaintiff classes will and hereby do move this Court for an order (1) preliminarily approving the parties' class action settlement, (2) certifying a monetary-relief Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3), (3) granting final certification to Rule 23(b)(2) injunctive-relief classes for the term of the proposed Consent Decree, (4) appointing Barry Goldstein as additional class counsel, (5) approving and directing distribution to the class of notice of settlement and a claim form, and (6) setting a schedule for the final approval process.

This motion is based on: this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the Declaration of James M. Finberg; the

Declaration of Barry Goldstein; the [Proposed] Order (1) Preliminarily Approving Class Action Settlement, (2) Provisionally Certifying Settlement Classes, (3) Directing Distribution of Notice of the Settlement, and (4) Setting a Schedule for the Final Settlement Approval Process; the Consent Decree; all other records, pleadings, and papers on file in this action; and on such other evidence or argument as may be presented to the Court at the hearing of this motion.

Defendant FedEx Express does not oppose this motion.

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND 1

I. PLAINTIFFS' COMPLAINTS 1

II. EXTENSIVE LITIGATION 2

III. SETTLEMENT NEGOTIATIONS 4

SUMMARY OF SETTLEMENT TERMS 5

I. INJUNCTIVE RELIEF 5

A. Selection Practices 5

B. Performance Evaluations 7

C. Discipline and Complaints 9

D. General Equitable Provisions 10

E. Communication of Decree Terms 10

F. Diversity Training 10

G. Reporting, Recordkeeping, Monitoring, Dispute Resolution 11

H. Dispute Resolution 11

II. MONETARY RELIEF 11

ARGUMENT 13

I. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL 13

A. The Terms of the Proposed Settlement Are Fair 13

1. The Settlement Is the Product of Serious, Arms' Length, Informed Negotiations 14

2. The Payments to the Named Plaintiffs and Declarants Are Reasonable 14

3. The Proposed Plan of Allocation is Fair and Reasonable 15

B. The Settlement Falls Within the Range of Reasonableness 16

1. Class Counsel Were Fully Informed When the Settlement Was Reached . 16

2. Liability Is Contested, and the Settlement Provides Reasonable Compensation for Class Members' Damages 17

II. THE COURT SHOULD GRANT FINAL CERTIFICATION TO THE INJUNCTIVE RELIEF CLASSES FOR THE TERM OF THE DECREE AND SHOULD CERTIFY A RULE 23(B)(3) DAMAGES CLASS 18

A. Final Certification of the Injunctive Relief Classes is Appropriate 18

B. Certification of a Monetary-Relief Settlement Class is Appropriate 19

III. BARRY GOLDSTEIN SHOULD BE APPOINTED AS ADDITIONAL CLASS COUNSEL 21

IV. THE PROPOSED NOTICE AND CLAIMS PROCESS ARE APPROPRIATE 22

A. The Proposed Class Notice Satisfies Due Process 22

B. The Notice Plan and Claims Process Are Appropriate 22

V. THE COURT SHOULD SET A FINAL SETTLEMENT APPROVAL SCHEDULE ... 23

CONCLUSION 24

TABLE OF AUTHORITIES
FEDERAL CASES

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (9th Cir. 1998) 20

Blackie v. Barrack,
524 F.2d 891 (9th Cir. 1975) 21

Brown v. Title Ticor Insurance Co.,
982 F.2d 386 (9th Cir. 1992) 19, 20

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 20, 21

Ingram v. The Coca-Cola Co.,
200 F.R.D. 685 (N.D. Ga. 2001) 19

In re Michael Milken & Associates Sec. Litigation,
150 F.R.D. 57 (S.D.N.Y. 1993) 22

In re Vitamins Antitrust Litig.,
2001 WL 856292, 4-5 (D.D.C.) 13, 14

In re S. Ohio Correctional Facility,
175 F.R.D. 270 (S.D. Ohio 1997) 14

McNamara v. Bre-X Mineral, Ltd.,
214 F.R.D. 424 (E.D. Tex 2002) 13

Molski v. Gleich,
318 F.3d 937 (9th Cir. 2003) 20

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 20

Torrisi v. Tucson Electric Power Co.,
8 F.3d 1370 (9th Cir. 1993) 23

Van Vranken v. Atlantic Richfield Co.,
901 F.Supp. 294 (N.D. Cal. 1995) 15

Young v. Polo Retail, LLC,
2006 WL 3050861 (N.D. Cal.) 13

FEDERAL STATUTES

42 U.S.C. §1981 . . . . . 2, 3

Federal Rule of Civil Procedure 23 . . . . . 3, 22

Federal Rule of Civil Procedure 23(b) . 18, 19, 20, 21

Federal Rule of Civil Procedure 23(b)(3) 1, 24

Federal Rule of Civil Procedure 56 3

TREATISES

Manual for Complex Litigation, Third Edition . . . 13

Manual for Complex Litigation, Fourth Edition . . 13

Newberg on Class Actions, Fourth Edition 13

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Subject to Court approval, the parties have settled plaintiffs' and class members' claims for comprehensive injunctive relief and significant monetary relief of approximately $54,850,000. The proposed Consent Decree resolves all of plaintiffs' and class members' claims except the non-class claims asserted by class representations individually in the Third Amended Complaint. *See* Third Amend. Compl. ¶¶77-81, 88-90, 98-100, 109-111, 117-119, 130-134, 141-143, 154-162, 181-185, 203-218, 226-257 (individual claims). The parties' proposed settlement satisfies all of the criteria for preliminary approval under federal law. The settlement was negotiated at arms' length and falls well within the range of possible approval. Not only is the monetary relief provided to class members substantial, but the extensive injunctive relief provided for in the Consent Decree will materially advance the goal of equal employment opportunity for African Americans and Latinos at FedEx Express ("FedEx").

Accordingly, the plaintiff classes request that the Court grant preliminary approval to the proposed Consent Decree (attached as Exhibit 1 to the proposed order), direct distribution of class notice and a claim form (attached as Exhibits 2 and 3 to the proposed order), and approve the proposed schedule for final approval. Plaintiffs also request that in connection with the settlement process, the Court certify settlement classes of African-American and Latino hourly employees and African-American Operations Managers under Rule 23(b)(3) for monetary relief (with

a right to opt out of the settlement pursuant to Rule 23(e)(3)) and under Rule 23(b)(2) for injunctive relief (with no opt out right), and appoint Barry Goldstein as additional Class Counsel.

FACTUAL BACKGROUND

On September 25, 2003, the Court issued an order relating the *Caldwell* and *Satchell* cases, and, on November 13, 2003, the cases were consolidated for all purposes pursuant to stipulation.

I. PLAINTIFFS' COMPLAINTS

Plaintiffs filed a First Consolidated Amended Complaint on November 12, 2003. The Consolidated Complaint, filed by nine class representatives,[1] asserted claims on behalf of two classes, a class of hourly employees and a class of salaried low-level managerial employees. The Consolidated Complaint asserted claims for race and national origin discrimination on behalf of African Americans and Latinos under 42 U.S.C. §1981, Title VII, and, with respect to California class members, FEHA. The Consolidated Complaint limited its claims and the scope of the putative class to FedEx's Western Region.

On October 12, 2005, plaintiffs filed a Second Consolidated Amended Complaint, adding Tyrone

---

[1] The named plaintiffs were Derrick Satchell, Kalini Boykin, Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Daniel Sherman, Kelvin Smith, Sr., and Ken Stevenson. On March 19, 2004, Daniel Sherman voluntarily dismissed his claims without prejudice.

Merritt, who had a claim regarding FedEx's Basic Skills Test ("BST"), as a class representative.

On November 14, 2006, the Court granted plaintiffs' motion for leave to file a Third Amended Complaint. The Third Complaint eliminated the class FEHA claim and broke the Title VII cause of action into separate claims for disparate impact and disparate treatment.

II. EXTENSIVE LITIGATION

Class counsel have actively prosecuted this case. They conducted extensive discovery and participated in hard-fought motion practice on a variety of procedural, discovery, merits, and evidentiary issues. By the time the Consent Decree was finally negotiated, all fact discovery had concluded, almost all expert discovery had concluded, and the Court had ruled on numerous issues, including several motions *in limine* about trial evidence. Class counsel, who are experienced in litigating class action and employment discrimination claims, were fully informed about the facts of the case and the applicable law.

The parties conducted discovery related to class certification throughout the first half of 2004. *See* Declaration of James M. Finberg ("Finberg Dec.") ¶17. On September 11, 2004, plaintiffs moved for class certification. FedEx separately sought summary judgment as to six of the named plaintiffs. These motions were litigated during the fall of 2004 and winter of 2005. Plaintiffs opposed summary judgment, moved to compel additional discovery, and sought relief from FedEx's summary judgment motions pursuant to FRCP 56(f).

On March 21, 2005, the Court granted plaintiffs' motion to compel and Rule 56(f) motion. On September 28, 2005, the Court granted class certification and denied FedEx's summary judgment motions pending further discovery. In its class certification order, the Court certified two classes nearly identical to the classes now proposed as part of the parties' settlement:

> 1. A "Minority Employee Class" consisting of all African-American and Latino Handlers, Freight Handlers, Material Handlers, Checker-Sorters, Customer Service Agents, Couriers, Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers, Shuttle Drivers, Dangerous Goods Agents, Information Agents, Operations Agents, Ramp Agents, Service Assurance Agents, Truck Control Agents, Trace Representatives, Input Auditors, Team Leaders, and Dispatchers, working in defendant's Western Region, who are or were employed during the class period, who allege claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. §1981, and for those class members working, or who worked, in California, the California Fair Employment and Housing Act, and
>
> 2. An "African-American Lower-Level Manager Class" consisting of all African-American Operations Managers working in defendant's Western Region during the class period who allege claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (both disparate impact and disparate treatment), 42 U.S.C. §1981, and for those class

members working, or who worked, in California, the California Fair Employment and Housing Act.

See Sept. 28, 2005 Order re: Plaintiffs' Mot. for Class Certification (Doc. No. 353). The Court certified plaintiffs' Title VII, §1981, and FEHA claims for Rule 23(b)(2) class treatment during the first phase of the case, which was limited to liability and equitable relief. The Court also set forth several different liability periods depending on plaintiffs' claims. The longest class period – for plaintiffs' §1981 claims regarding compensation and certain promotions – began on October 17, 1999.

FedEx sought to appeal the Court's class certification order to the Ninth Circuit Court of Appeals pursuant to FRCP 23(f), and, on October 14, 2005, sought a stay of the district court proceedings pending the outcome of that appeal. This Court denied FedEx's motion for a stay, and the Ninth Circuit denied FedEx's Rule 23(f) petition on December 12, 2005.

The parties conducted broad, extensive and thorough discovery on the merits of the action through the end of 2005 and all of 2006. Altogether, the written fact discovery conducted in this case included 29 sets of document requests, nine sets of interrogatories, and requests for admission propounded by plaintiffs, and multiple sets of document requests, interrogatories, and requests for admission propounded by FedEx. *See* Finberg Dec. ¶22. Class Counsel reviewed several hundreds of thousands of pages of documents that were produced in discovery. Class Counsel reviewed, and, with expert assistance, analyzed computerized

personnel and payroll data from 1997 through October 2006. *See id.* ¶23.

Deposition discovery was also extensive. Plaintiffs deposed approximately 122 individuals, including approximately 42 30(b)6) deponents who testified on a variety of topics, including FedEx's personnel policies, evaluations, training, computerized records, retention of documents, the BST, and the reasons for employment actions against specific class members. *See id.* ¶24. Plaintiffs also defended approximately 71 depositions, including approximately nine depositions of named plaintiffs and seven depositions of other plaintiffs or class members. *See id.*

In June, September, and December 2006, the parties served and filed expert reports, rebuttal expert reports, and surrebuttal expert reports, including reports prepared by statisticians, industrial organizational psychologists, labor economists, a sociologist, a social psychologist, and a management practices specialist. Plaintiffs and FedEx each took approximately five expert depositions. *Id.* ¶25.

In the winter of 2006, the parties exchanged lists of trial exhibits. The parties also prepared jury verdict forms. In December 2006 and January 2007, the parties filed and briefed many motions *in limine*. *Id.* ¶26.

III. SETTLEMENT NEGOTIATIONS

At the instruction of the Court, the parties participated in negotiations with the assistance of an experienced mediator, Hunter Hughes of Atlanta, Georgia. The parties had face-to-face negotiating

sessions in April 2006, December 2006, February 2007, and March 2007. *Id.* ¶27. Under the supervision of the mediator, the parties' negotiations were conducted at arms' length. *Id.* ¶28. The terms of the parties' agreement following negotiations are contained in the Consent Decree, attached as Exhibit 1 to the proposed preliminary approval order.

SUMMARY OF SETTLEMENT TERMS

The proposed Consent Decree provides comprehensive injunctive relief and substantial monetary relief.

I. INJUNCTIVE RELIEF

During the four-year period of the Decree, FedEx has agreed to implement comprehensive affirmative relief addressing the promotion, compensation, and discipline claims in this action, including the following:

A. Selection Practices

1. FedEx will discontinue use of the BST as a requirement for awarding Courier, Ramp Transport Driver, or Customer Service Agent positions, without requiring passage of an alternative cognitive-ability test as a condition precedent to being offered one of those positions during the period of the Decree. *See* Consent Decree Section XI.A.

2. If FedEx chooses to implement a new selection device or test for those positions, it will monitor whether such selection device or test has an adverse impact with respect to African-Americans or Latinos, and it will report the results of its adverse impact

analyses to a Special Master and to a subset of class counsel designated as "Monitoring Counsel." If there is adverse impact, FedEx will, after consultation with the Special Master and Monitoring Counsel, take appropriate steps, in accordance with the Uniform Guidelines on Employee Selection Procedures. *Id.*

3. As part of the parties' settlement, FedEx has eliminated the "casual" category of employees and will develop a procedure to allow Active Casual Employees (those who have worked for FedEx in the 90-day period before the effective date of the elimination) to apply for available positions during a 90-day period following the effective date of the elimination. *Id.* Section XI.B.

4. Subject to very limited authorized exceptions enumerated in the Consent Decree, hourly positions will be filled only through the Job Change Application Tracking System ("JCATS"). A "monitoring panel" described in Section XVII of the Decree will develop and review reports to help ensure that this occurs, and monitoring reports will be provided to Monitoring Counsel and the Special Master. *Id.* Section XI.C.6.[2]

---

[2] The monitoring panel will be established within two weeks of settlement approval and will be charged with using its best efforts to ensure FedEx's compliance with the Decree. The panel will include an attorney from FedEx's Labor and Employment Group, an attorney from the FedEx Litigation Group, and a Managing Director from FedEx Human Resources. The panel will report directly to the Chief Diversity Officer and the Legal Department Vice President member of the FedEx Officer Diversity Council. FedEx will provide the panel with all resources reasonably necessary to carry out its duties.

In selecting members of the monitoring panel, FedEx will use its best efforts to appoint individuals who will be effective in carrying out the panel's duties and responsibilities. Monitoring

5. FedEx will make a computer or terminal reasonably available for employees to review posted Career Opportunities. *Id.* Section XI.C.1.

6. For JCATS positions, the manager will not approve, but only "verify" whether an employee has met the minimum objective requirements. FedEx will replace references to manager "recommendation" with references to manager "verification" in its Career Opportunities policy to more accurately reflect the role of manager sin the internal application process. *Id.* Sections XI.C.4, XI.E.1.

7. FedEx will reprogram JCATS so that if a manger fails to take the action required to timely verify that an employee meets the minimum objective requirements, the employee's name will be included on the list of eligible applicants for consideration by the hiring manager. The hiring manager will verify the employee's eligibility before the employee may be offered the position. *Id.* Section XI.E.2.

8. FedEx will revise its Candidate Selection and Internal Applicant Processing policies to subject mangers to discipline up to and including termination when they fail to fill positions according to Company policy, including selection policies relating to priority groups and CEV scores. *Id.* Section XI.F.

Counsel will be provided with a resume and qualifications of each person FedEx intends to appoint. Monitoring Counsel may interview the candidate and give counsels' views about his or her qualifications and suitability. *See* Consent Decree Section XVII.

9. The FedEx intranet will contain information about the Assessment of Skills, Performance and Interests Requirement for Entry into Management ("ASPIRE") process for each division. *Id.* Section XI.D.1.

10. FedEx will develop and distribute offline materials that outline the ASPIRE process for each division. *Id.* Section XI.D.2.

11. FedEx will allow enrollment in the available ASPIRE to Management classes upon verification by an employee's manager that the employee meets the following eligibility requirements: the employee has no active warning letter, has a satisfactory rating in all performance review categories, and a satisfactory overall performance review score; has two year of college credit or equivalent work experience; and has four years of work experience in addition to the experience, if any, used for college credit equivalent. *Id.* Section XI.D.3.

B. Performance Evaluations

12. FedEx will expand the character capacity for online performance review categories to accommodate additional anchor statements, descriptions, and guidelines to assist managers in evaluating employee performance, particularly with respect to subjective categories. *Id.* Section XII.1.

13. FedEx will develop and communicate to managers clear guidelines setting forth when an exception to the rating scale can be given. Exception scores will be appropriate for: (a) active warning or reminder letters; (b) compliance with FMLA, military

leave laws, state workers compensation laws, or other federal, state or local law; (c) adding bonus points for perfect attendance and/or perfect punctuality; (d) consideration of documented events such as severe weather conditions or traffic situation that impacted a significant number of employees on the same date in the same location; (e) consideration of documented staffing shortages that impacted categories such as Quality or Efficiency; (f) consideration of other documented circumstances that justify exceptions in compliance with policy and after consultation with Human Resources and the location Senior Manager. *Id.* Section XII.3.

14. FedEx will enforce its written requirements that all exception scores are approved by the location Senior Manager and that the reason for all exception scores is documented in the comments section of the performance review. *Id.* Section XII.4.

15. FedEx will add a performance review item to its location audit process to audit a sample of performance reviews for hourly employees to ensure that the guidelines and rating scales for the objective scores are followed an any exception ratings are fully documented and approved as required by policy. *Id.* Section XII.5.

16. FedEx will develop an interactive mandatory training module to assist mangers in conducting performance reviews in an accurate and consistent manner, including a focus on the items set forth in the performance evaluation section of the Decree. *Id.* Section XII.6.

17. FedEx will establish a procedure by which it will monitor whether the subjective components of its performance evaluations for Handler and Courier produce more than 2 negative standard deviations of disparity between African-American or Latino and white employees in the same job code, organization code, COMAT, time-in-position, and length of FedEx Express service. FedEx will conduct regression analyses for Handlers and Couriers in the Western Region of the AGFS and DGO Divisions, aggregating data by (1) Handlers in AGFS, (2) Couriers in AGFS, (3) Handlers in DGO, and (4) Couriers in DGO. FedEx will establish a procedure by which it will monitor whether the subjective components of its performance evaluations for Operations Manager produce more than 2 negative standard deviations of disparity between African-American and white employees in the same job code, organization code, COMAT, time-in-position, time-in-management, and length of FedEx service. FedEx will conduct a regression analysis, aggregating all data from (1) the Western Region of the AGFS division, and (2) the Western Region of the DGO Division. *Id.* Section XII.7.

18. FedEx will report the results of its impact analyses to Monitoring Counsel and the Special Master. If, for any year during the term of the Decree, there is adverse impact as to either African-Americans or Latinos, FedEx will validate in accordance with the Uniform Guidelines the subjective portions of the performance evaluation and associated processes for which a statistically significant disparity was found. *Id.*

C. Discipline and Complaints

19. FedEx will revise its Acceptable Conduct and performance Improvement Policies to provide for greater consistency in the use of disciplinary tools such as warning letters and performance reminders, including by adding language that clarifies that an OLCC is not considered discipline but can be considered when determining whether discipline is required and when identifying patterns of conduct or performance issues may warrant discipline, and by merging the separate categories of "documented verbal counselings" and "documented written counselings" into the single category of "documented counselings," and require that all counselings be "documented" as an OLCC. *Id.* Section XIV.A.1.

20. FedEx will develop an interactive mandatory training module to assist managers with understanding and applying the Acceptable Conduct and Performance Improvement policies for greater consistency and neutrality. *Id.* Section XIV.A.4.

21. FedEx will enforce its policy that a written record must be made of the basis for all discipline. *Id.* Section XIV.A.2.

22. FedEx will prepare a complaint tracking spreadsheet that will record pertinent information regarding complaints in the Western Region of alleged discrimination on the basis of race (African American) or national origin (Latino) or retaliation against Class Members. *Id.* Section XV.2.

23. FedEx will provide the complaint tracking spreadsheets on a regular basis to the Monitoring Panel and to Monitoring Counsel. *Id.* Section XV.3.

24. FedEx Express will, on a regular basis, provide the Monitoring Panel and Monitoring Counsel with a sample of employee complaints (as selected by the Monitoring Panel from the complaint tracking spreadsheet), along with all related non-privileged investigative files, and non-privileged written reports summarizing the investigation and remedial actions taken or proposed by FedEx relative to each such complaint, for the purpose of reviewing the propriety and justness of the resolution of such complaints. The Monitoring Panel will review FedEx's investigation of each complaint and, where appropriate, may make recommendations regarding the investigation and resolution of complaints. The Monitoring Panel may recommend the Company take additional investigative steps including, and may take any other investigative actions the panel deems appropriate. In carrying out its monitoring duties, the Monitoring Panel may seek non-privileged backup or further documents or information regarding any complaint identified on the tracking spreadsheet. *Id.* Sections XV.4–XV.6.

25. FedEx will modify the steps for initiating a GFT to encourage, rather than require, employees to engage in an open and frank discussion with the decision-maker before the GFT. *Id.* Section XVI.1.

26. FedEx will allow the employee a reasonable amount of time prior to the GFT hearing to review and respond to the rationale submitted in support of the decision. *Id.* Section XVI.2.

D. General Equitable Provisions

27. FedEx will not knowingly maintain or enact any policy or practice that has the purpose or effect of unlawfully discriminating against any hourly class members on the basis of race or national origin, or the effect of unlawfully discriminating against any salaried, managerial class members on the basis of race. *Id.* Section X.1.b.

28. FedEx shall make available to African-American and Latino employees and African-American Operations Managers the same opportunities and terms and conditions of employment that FedEx affords to similarly situated white employees and white Operations Managers. *Id.* Section X.1.d.

E. Communication of Decree Terms

29. Within 30 days of settlement approval, and at least once during each year of the Decree thereafter, FedEx will provide to each of its Western Region officers, managers, and employees a written communication that reflect the company's commitment to diversity, equal employment opportunity, and implementation of the non-monetary aspects of the Consent Decree. *Id.* Section XX.

F. Diversity Training

30. FedEx will develop an interactive, mandatory diversity training module to help managers identify barriers that inhibit valuing race and ethnic diversity, understand why race and ethnic diversity awareness and acceptance is important to FedEx's growth and

future, learn how racial and ethnic stereotypes hinder effective communication and workplace interactions, and learn how to recognize differences and how those differences can enhance the workgroup. *Id.* Section XXI.

G. Reporting, Recordkeeping, Monitoring, Dispute Resolution

33. Section XVIII(A) of the Consent Decree lists a series of records that FedEx must retain for the duration of the Decree (or as required by law, whichever is longer). On reasonable notice, Monitoring Counsel will be entitled to review all non-attorney/client privileged or workproduct produced documents required to maintained or created by the Decree.

34. FedEx will provide regularly scheduled, detailed progress reports on its compliance with the Decree and meet regularly with Monitoring Counsel and the Special Master. *Id.* Sections XVIII.C., XVIII.D.

H. Dispute Resolution

35. The parties agree to the appointment of Hunter Hughes as Special Master.

36. The Consent Decree establishes a comprehensive dispute resolution procedure, with disputes generally to be resolved by the Special Master. The Decree provides that decisions made by the Special Master may be appealed to Court. *See id.* Section XIX.

III. MONETARY RELIEF

In addition to the significant, comprehensive injunctive relief described above, FedEx will establish a Settlement Fund of approximately $54.85 million, plus one half of the employer's share of payroll taxes.[3] See id. Section XXII. This fund will compensate members of the Settlement Class who do not opt out and who timely submit claims, provide small service payments to class representatives and 18 declarants for service they provided on behalf of the class, and pay attorneys' fees, notice costs, and administrative expenses.

Of the $54.85 million Settlement Fund, nearly $38.5 million will provide payments directly to the class, reduced only by notice costs and service payments not to exceed $360,000 total (or less than 1% of the Settlement Fund), and opt out credits. Each class member who does not opt out of the settlement will receive a proportionate share of the net settlement payment (*i.e.*, $38.5 million less notice costs and service payments and op out credits). For African-American and Latino hourly claimants, the

---

[3] The precise amount to be paid by FedEx to the Settlement Fund will be calculated as follows: (1) $53.5 million, plus (2) $53.5 million multiplied by either 5% (0.05) or the United States Treasury Bill rate as established on the tenth business day after preliminary approval, whichever is lower, for the period between the tenth business day after Preliminary Approval and the date FedEx wire transfers incremental portions of money to the Settlement Fund Account as and at the times required under this Consent Decree. Any credits to FedEx for employees who have opted out of the Settlement Class will be deducted from the final payment. *See* Consent Decree Section XXII.A.1.

calculation of each claimant's share will be based on a point system that awards a certain number of points for the following factors: (1) length of service; (2) status as part-time or full-time employee; and (3) BST failure. For African-American managerial claimants, the specific factor considered as part of the point system will be length of service as an operations manager. *See id.* Section XXII.L.

Class members who do not opt out will be required to submit a claim form in order to receive a monetary award. A copy of the claim form is attached to the proposed preliminary approval order as Exhibit 3. In addition to asking questions necessary to allocate points as described above, the claim form asks class members whether they believe they have been discriminated against. Once claim forms are submitted, the claims administrator –Settlement Services, Inc.—will allocate points, determine each class member's award, and distribute the settlement proceeds as soon as practicable.[4]

The proposed Consent Decree also provides that $15 million of the Settlement Fund may be used to reimburse class counsel for the approximately $2.575 million in costs they have incurred to date and $12.425

---

[4] It is the intention of the parties to distribute the entire amount in the Settlement Fund Account. If, despite the claims administrator's efforts, checks remain uncashed after they have become invalid, the remaining sum shall become part of a *cy pres* fund to be distributed to one or more charitable organizations selected by the parties. If the parties cannot agree on a *cy pres* recipient, they will each submit two possible beneficiaries to the Court, which shall determine the distribution of the remaining funds. *See* Consent Decree Section XII.P.

million in attorneys' fees for their work performed through the date of preliminary approval. Fees for work performed by Class Counsel in monitoring the settlement will be paid from interest on the Settlement Fund, on an hourly basis. *See* Consent Decree Section XXIII.[5]

ARGUMENT

I. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL.

To grant preliminary approval of this class action settlement, the Court must find only that the settlement is non-collusive and within "the range of possible approval." *Young v. Polo Retail, LLC*, 2006 WL 3050861 (N.D. Cal.); *see also In re Vitamins Antitrust Litig.*, 2001 WL 856292, *4-5 (D.D.C.); Newberg on Class Actions, Fourth Edition, §11.25.

A. The Terms of the Proposed Settlement Are Fair.

As long as "preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of

---

[5] If the interest is insufficient to pay for Special Master fees, one half of the employer's share of payroll taxes, claims administration, costs of monitoring, and Class Counsel's full hourly rate, the other listed items will be given priority over payment to Monitoring Counsel. If the interest covers all of these items, Monitoring Counsel will receive its full hourly rate, and, if available, a multiplier of that rate. *See* Consent Decree Section XXIII.C.

segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval," the Court should preliminarily approve the settlement. *In re Vitamins*, 2001 WL 856292 at *4-5 (quoting Manual for Complex Litigation, Third (FJC 1995)). The Court may also direct the giving of notice to the class members of a final approval hearing, "at which arguments and evidence may be presented in support of and in opposition to the settlement." *McNamara v .Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. (quoting Manual for Complex Litigation, Third, at 237); 4 Newberg §11.25 (quoting same).[6]

Here, the parties negotiated the proposed settlement in good faith and at arms' length. *See* Finberg Decl. ¶¶27–31. As noted above, extensive discovery has allowed Class Counsel – who are experience employment discrimination and class action attorneys – to assess the strengths and weaknesses of the claims against FedEx and the benefits of the proposed settlement under the circumstances of this case. *Id.* ¶¶22–26, 31.

Counsel for both sides have conducted a thorough investigation into the facts of the case and have diligently investigated the class members' claims. Class Counsel believe the settlement is fair, reasonable, and adequate, achieves an excellent result

---

[6] The fourth edition of the Manual for Complex Litigation was released in 2004 and does not include this precise language, but instead suggests that if a court has "reservations" about any of the issues described, it should "raise questions . . . and perhaps seek and independent review . . . ." Manual for Complex Litigation, Fourth, at 321 The end result is the same.

for class members, and is in the best interest of the classes in light of all known facts and circumstances, including the risk of significant delay and FedEx's asserted defenses. *See id.* ¶¶32–35.

1. The Settlement Is the Product of Serious, Arms' Length, Informed Negotiations.

The Settlement resulted only after extensive, arms' length settlement negotiations that were conducted after rigorous discovery regarding the merits and damages of the disputed claims, and under the supervision of experienced mediator Hunter Hughes. *See id.* ¶¶27–31. The negotiations were protracted, and the mediation itself required multiple lengthy sessions. *See id.* In sum, the proposed settlement is the non-collusive product of hard-fought litigation.

2. The Payments to the Named Plaintiffs and Declarants Are Reasonable.

The Settlement provides for service payments of up to $30,000 each for class representatives Derrick Satchell, Kalini Boykin, Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Tyrone Merritt, Kelvin Smith, Sr., and Ken Stevenson. In addition, the settlement provides for service payments of up to $5000 each for 18 additional class members who submitted sworn declarations and, in some cases, were deposed by FedEx.

These service payments recognize the time and effort the class representatives and declarant/deponents expended on behalf of the plaintiff classes. "Courts routinely approve incentive awards to

compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001), *quoting In re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997)). In *Coca-Cola*, the court approved awards of *$300,000* to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 300 (N.D. Cal. 1995) (approving $50,000 participation award).

In this case, all of the class representatives performed important services for the benefit of the plaintiff classes. They provided information regarding the structure of the company and their job duties during lengthy interviews; they produced relevant documents; and they worked with Class Counsel throughout the case. *See* Finberg Decl. ¶¶33–35. The additional, smaller amounts provided for 18 additional class members recognize that those class members spent substantial time preparing sworn declarations and, in all but one case, preparing for and taking part in their own depositions. *See id.*

Altogether, the service awards to class representatives and the service awards for declarants and deponents are capped at $360,000, less than 1% of the $38.5 million that will be used to pay class claims. The awards are also limited to 27 individuals in a class of more than 20,000 people. The service payments are appropriate and justified as part of the overall settlement in light of the class representatives' and 18

class members' services to the plaintiff classes. Moreover, FedEx does not oppose this proposed award of service payments.

3. The Proposed Plan of Allocation is Fair and Reasonable.

As described above, the proposed plan of allocation takes into account several factors to ensure that the ultimate division of the settlement proceeds among class members is fair and accurate, while at the same time preserving the intended efficiencies of class action litigation: For those African-American and Latino employees who work or worked in hourly jobs, the specific factors to be considered are length of service in those jobs, status as a part-time or fulltime employee, and failure of the BST. The length of service and part-time / full-time factors take account of the fact that those who served the longest in hourly jobs were most likely to have experienced discrimination, whether in compensation, discipline, or performance reviews. The BST factor takes account of the fact that class members who failed the BST have additional, strong, disparate impact promotions claims based on that test.

For those African-American employees who work or worked as operations mangers, the specific factor to be considered as part of the point system is length of service as an operations manager. As explained above, the length of service factor takes account of the fact that those who served longest were more likely to have experienced discrimination and to have suffered greater damage.

B. The Settlement Falls Within the Range of Reasonableness.

1. Class Counsel Were Fully Informed When the Settlement Was Reached.

As noted above, and as extensively described in the Finberg Declaration ¶¶13–31, Class Counsel spent thousands of hours litigating this case and vigorously investigating the claims asserted against FedEx. Class Counsel spoke with approximately 1,000 class members, thoroughly interviewed many hundreds, and analyzed the information from those interviews. Class Counsel also conducted approximately 122 depositions, including approximately 42 subject-matter experts designated pursuant to rule 30(b)(6), depositions and five expert depositions. Finberg Dec. ¶24. Class Counsel also defended approximately 71 depositions, including approximately 9 named plaintiff depositions and approximately 47 depositions additional class members and FedEx employees. *Id.* Class Counsel also reviewed thousands of pages of documents, propounded 39 sets of discovery requests, and responded to multiple sets of discovery requests propounded by FedEx. *See id.* ¶22. In addition, the parties litigated motions to compel, plaintiffs' motion for class certification, and FedEx's summary judgment motion, and completed substantial trial preparation, including exchanging exhibit lists, drafting verdict forms, and briefing numerous motions *in limine*. Class Counsel used the extensive knowledge of FedEx practices that counsel gained through discovery and motion practice as the basis for negotiations regarding the significant affirmative relief described above. *Id.* ¶¶30–31.

During discovery, Class Counsel also received information from FedEx related to appropriate calculation of damages, including a detailed database of employment and payroll information. *See id.* ¶31. Using that data, Class Counsel's statistical experts performed promotions and compensation analyses and then a damages analysis. FedEx's experts did the same, and the parties' expert damages calculations formed the basis for negotiations regarding the monetary terms of the settlement. *Id.*

In sum, Class Counsel completed substantial investigation and discovery and negotiated the proposed settlement with complete knowledge regarding the strengths and weaknesses of the case and the amounts necessary to compensate class members for the harm suffered.

2. Liability Is Contested, and the Settlement Provides Reasonable Compensation for Class Members' Damages.

Of particular relevance to the reasonableness of the proposed settlement is the fact that FedEx has and would continue to contest vigorously the merits of class members' claims. FedEx denies that it engaged in *any* intentional discrimination against African-American or Latino employees and points to, among other things, its affirmative-action policies and the percentage of minority employees within its workforce as compared to regional labor markets. FedEx also contends that the BST has been properly validated and is job-related and consistent with business necessity. Notwithstanding these arguments, the settlement

commits FedEx to significant, wide-ranging affirmative relief and to paying $54.85 million.

By any measure, the relief obtained is an excellent result for the class. FedEx will *eliminate* use of the BST as a requirement for awarding Courier, Ramp Transport Driver, or Service Agent Positions. Moreover, FedEx will not implement *any* substitute cognitive-ability test as a condition precedent to being offered one of those positions during the period of the Decree – relief that would not have been available even after complete victory following a full trial on the merits. *See* Consent Decree Section XI.

FedEx is also committed to significant additional affirmative relief. For example, if FedEx Express chooses to implement a new selection device or (non-cognitive ability) test for the positions of Courier, Ramp Transport Driver, or Service Agent, it will monitor whether the selection device or test has an adverse impact and will report the results of its analyses to Monitoring Counsel and the Special Master. If there is adverse impact, FedEx Express will take appropriate steps, after consultation with Monitoring Counsel and the Special Master and in accordance with the Uniform Guidelines on Employee Selection Procedures. *See id.* In connection with promotions, FedEx will eliminate the manager approval requirement, ensure that jobs are posted on the JCATS system, and ensure that CEV and priority group rules are followed. *See id.*

As to performance evaluations, which have a direct impact on compensation, FedEx will change the exception process to reduce managerial discretion. *See id.* Section XII. In addition, FedEx will monitor

whether the subjective components of its Courier, Handler and Operations Manager performance evaluations produce more than two negative standard deviations of disparity for minority employees, will report the results of its analyses to Monitoring Counsel and the Special Master, and, if adverse impact is found, will validate the subjective components in accordance with the Uniform Guidelines. *Id.*

The Decree also provides substantial affirmative relief with respect to its discipline, complaint, and GFT systems. *Id.* Sections XIV–XVI. The reporting, recordkeeping, and dispute resolution provisions of the Decree ensure that Monitoring Counsel will have a real ability to track FedEx's compliance. *Id.* Sections XVIII–XIX.

Finally, the settlement will provide nearly $38.5 million in direct cash benefits to the Settlement Class.

Although the plaintiff classes belief their claims have merit, they also recognize that they would face significant legal, factual, and procedural obstacles to recovering damages on their claims. In light of the strengths and weaknesses of the case, Class Counsel believe the settlement fits easily within the range of reasonableness because it achieves significant benefits for the class in a case where failure at trial is certainly possible. Class members will also receive settlement benefits faster than they would receive awards obtained after trial and likely appeal.

II. THE COURT SHOULD GRANT FINAL CERTIFICATION TO THE INJUNCTIVE RELIEF CLASSES FOR THE TERM OF THE DECREE AND SHOULD CERTIFY A RULE 23(B)(3) DAMAGES CLASS.

A. Final Certification of the Injunctive Relief Classes is Appropriate.

On September 28, 2005, the Court bifurcated this litigation into two phases. *See* Sept. 28, 2005 Order at 17. The first phase was to be limited to liability and equitable relief. *See id.* The second phase would address damages. *Id.*

The Court certified two classes under Federal Rule of Civil Procedure 23(b)(2) for the liability and equitable-relief phase of the case. *See id.* The Court found that those two classes – a Minority Employee Class and African-American Lower-Level Manager Class – satisfied all of the requirements for certification under Rule 23(a). *See id.* The Court also found that certification under Rule 23(b)(2) was appropriate for the injunctive- and equitable-relief phase. The Court's Order did not decide on procedures to be used during the second, damages phase of the case.

The proposed Consent Decree adopts the structure set out in the Court's September 28 Order. The parties agree that the Rule 23(b)(2) classes already certified by the Court will remain in place for the purpose of administering the injunctive- and equitable-relief portions of the Decree. *See* Consent Decree Section VII. Accordingly, plaintiffs respectfully request that the

Court grant final certification to the injunctive relief classes for the term of the Decree.

B. Certification of a Monetary-Relief Settlement Class is Appropriate.

Because the Consent Decree provides significant monetary relief in addition the equitable relief already discussed, the parties have also agreed to certification of a monetary-relief Settlement Class under Federal Rule of Civil Procedure 23(b)(3). The definition of the two-part Settlement Class tracks the definition of the Minority Employee and African-American Lower-Level manager classes already certified by the Court:

> 1. All Minority employees of the AGFS or DGO Divisions of FedEx Express who are or were employed in the position of Handlers, Freight Handlers, Material Handlers, Checker-Sorters, Customer Service Agents, Couriers, Swing Drivers, Ramp Transport Drivers, Ramp Area Drivers, Shuttle Drivers, Dangerous Goods Agents, Information Agents, Operations Agents, Ramp Agents, Service Assurance Agents, Truck Control Agents, Trace Representatives, Import Auditor, Team Leaders, and Dispatchers in the COMATs that comprised the Western Region at any time between October 17, 1999, and the Preliminary Approval Date, who do not timely opt out.
>
> 2. All African American employees of the AGFS or DGO Divisions of FedEx Express who are or were employed in the position of Operations Managers in the COMATs that comprised the Western Region at any time between October

17, 1999, and the Preliminary Approval Date who do not timely opt out.

See Consent Decree Section VII.

The only significant difference between the proposed Settlement Class and the classes already certified is that certification under Rule 23(b)(3) will allow class members to opt out of the monetary-relief aspect of the settlement and preserve their right to seek damages independently. *See Brown v. Title Ticor Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). This approach protects class members' due process rights, and is consistent with the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and the Ninth Circuit's decision in *Brown*, which explain that due process requires an opportunity to opt out of significant monetary relief but not equitable relief. *Ortiz*, 527 U.S. at 846–48; *Brown*, 982 F.2d at 392. Indeed, in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), the Ninth Circuit recognized that certification under both Rule 23(b)(2) and Rule 23(b)(3) is appropriate in cases like this one that involve substantial injunctive *and* monetary relief. *See id.* at 951 n.16 (certification under both Rule 23(b)(2) and Rule 23(b)(3) is one way to address due process concerns raised by the release of substantial damages claims).

The monetary-relief Settlement Class proposed in the Consent Decree satisfies all of the requirements for certification under Rule 23. As the Court has already found, the class satisfies the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a). *See* Sept. 28, 2005 Order at 6–11. In addition, the Rule 23(b)(3) predominance and superiority standards

clearly are met. *See* FRCP 23(b)(3); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."). Since certification of the monetary-relief classes under Rule 23(b)(3) is in the settlement context, the Court need not consider the manageability requirement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

The representative plaintiffs and all of the proposed class members seek damages based on FedEx's discriminatory employment practices. Common issues predominate with respect to plaintiffs' and class members' claims because the personnel policies and structure of FedEx's Western Region are uniform and centralized. *See* Bielby Rep. at ¶¶8-14 (attached as an exhibit to plaintiffs' motion for class certification, filed Sept. 11, 2004 (Doc. Nos. 92, 93)). FedEx's policies regarding promotion, compensation, discipline and performance evaluation are all governed by the "People Manual," which applies throughout the Western Region. *See* Plfs.' Motion for Class Certification at 28–29. The forms and procedures used for personnel decisions are the same throughout the Western Region. *Id.* As a result, plaintiffs' and class members' claims raise numerous common questions of fact and law, including: (1) whether the FedEx workforce is segregated by race with respect to job categories; (2) whether FedEx denies minority employees equal promotion opportunities; (3) whether FedEx's adverse treatment of minorities is intentional; and (4) whether FedEx's conduct violates Title VII. Because of the uniform nature of FedEx's employment policies, these common questions predominate over individual ones. Indeed, the principle individualized issue raised by

plaintiffs' and class members' claims – the calculation of individual damages – is insufficient to defeat class certification. *Blackie v. Barrack*, 524 F.2d 891, 906-06 (9th Cir. 1975).

The class action device proposed here is also "superior to other available methods" for adjudication. FRCP 23(b)(3). This action allows all of the class members' claims to be fairly, adequately, and efficiently resolved to a degree that no other mechanism or forum would provide. As in *Hanlon*, the alternative method of resolution is for each individual to bring a separate claim, each for a relatively small amount of damages. *See* 150 F.3d at 1023. These claims "would prove uneconomic for potential plaintiffs' because "litigation costs would dwarf potential recovery." *Id.* For this reason, a class action is the superior method of resolution.[7]

III. BARRY GOLDSTEIN SHOULD BE APPOINTED AS ADDITIONAL CLASS COUNSEL.

Plaintiffs request that the Court appoint Barry Goldstein, of counsel to Goldstein, Demchak, Baller, Borgen & Dardarian, as additional Class Counsel.

Mr. Goldstein is extremely well-qualified and easily meets the standards of Rule 23(g), as set forth in his accompanying declaration. Mr. Goldstein participated

---

[7] FedEx does not oppose certification of a Rule 23(b)(3) class for settlement purposes. However, if the settlement is not approved and this case returns to active litigation, FedEx reserves the right to oppose a motion for Rule 23(b)(3) certification.

actively in the extensive investigation of class claims, including by obtaining and reviewing documents and taking depositions. *See* Goldstein Decl. ¶2, 12–15. All told, Mr. Goldstein spent over 1200 hours litigating this case. *See id.* ¶2. He is also very experienced and knowledgeable regarding complex employment discrimination class actions, as set forth in his declaration. *See id.* ¶¶4–11 (describing extensive experience in successfully litigating employment law actions in federal and state courts).

Mr. Goldstein was the principal attorney litigating the plaintiffs' challenge to the legality of the BST. In the proposed Consent Decree, Mr. Goldstein is designated to serve as one of the Monitoring Counsel who have the "authority to act on behalf of the Class on matters of compliance or non-compliance . . . ." *See* Consent Decree Section IV.W. Given Mr. Goldstein's general experience and his knowledge of the important issues litigated in this action, his participation as one of Class Counsel will contribute to assuring that the remedial provisions in the proposed Consent Decree are effectively and properly implemented.

IV. THE PROPOSED NOTICE AND CLAIMS PROCESS ARE APPROPRIATE.

A. The Proposed Class Notice Satisfies Due Process.

The content of the proposed Notice of Class Action Settlement, which is attached to the proposed preliminary approval order as Exhibit 2, fully complies with due process and FRCP 23. The Notice provides the definition of the Settlement Class, describes the nature of the action and claims, states that a member

of the monetary-relief Settlement Class may enter an appearance through counsel, explains the procedures for excluding oneself or objecting to the settlement, and explains the binding effect of the judgment on those who remain in the class. The Notice also describes the terms of the settlement, informs the class about the attorneys' fees terms of the agreement, and provides specific information regarding the date, time, and place of the final approval hearing.

The detailed information in the proposed Notice is more than adequate to put class members on notice of the proposed settlement. Courts have approved class notices even when they provided only general information about a settlement. *See, e.g., In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (class notice "need only describe the terms of the settlement generally"). The proposed Notice exceeds this bare minimum and fully complies with the requirements of Rule 23(c)(2)(B).

B. The Notice Plan and Claims Process Are Appropriate.

The Consent Decree provides that notice will be mailed individually by the claims administrator to the last known address of each class member within 40 days of preliminary approval. To ensure a complete and accurate mailing, FedEx will provide the claims administrator with names and contact information of potential Settlement Class members within 20 days of preliminary approval, and that list will be combined with a similar list submitted by Monitoring Counsel and addresses will be updated with any information available through the National Change of Address system. The claims administrator will trace all

returned undeliverable notices and re-send to the most recent addresses available. *See* Consent Decree Section XXII.C.

As discussed above, the notice to the class will contain information about how to exclude oneself, object to the settlement, and/or file a claim. Class members will have 45 days from the date of mailing to submit opt-out requests or to comment on or object to the settlement. This is sufficient time to given Settlement Class member a fair opportunity to respond. *Cf. Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent 31 days before the deadline for objections and 45 days before the hearing). Class members will have 70 days from the mailing of Notice to submit a claim form. In doing so, they will be permitted to correct any of the pre-printed information of the claim form. Once clams are received, the claims administrator will sent payments as soon as practicable via First Class Mail.

V. THE COURT SHOULD SET A FINAL SETTLEMENT APPROVAL SCHEDULE.

The last step in the settlement approval process is the formal hearing, at which the Court may hear all evidence and argument necessary to evaluate the settlement. Class Counsel proposes the following schedule for final approval:

May 21, 2007	Last day for the claims administrator to mail Notice and claim form to class members.

July 5, 2007	Last day for objections and comments in favor of the settlement.
July 5, 2007	Last day to opt out.
July 30, 2007	Last day for class members to submit claim form.
July 6, 2007	Motion for final approval and fee application due.
July 27, 2007	Reply papers due.
August 10, 9:00 a.m.	Final approval hearing.

CONCLUSION

For all of the foregoing reasons, the plaintiff classes respectfully request that the Court: (1) preliminarily approve the parties' class action settlement and proposed Consent Decree, (2) certify a monetary-relief Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3), (3) grant final certification to Rule 23(b)(2) injunctive-relief classes for the term of the proposed Consent Decree, (4) appoint Barry Goldstein as additional Class Counsel, (5) approve and direct distribution of the class notice and claim form, and (6) set the foregoing schedule for the final approval process.

Dated: April 9, 2007

/s/
James M. Finberg

James M. Finberg (SBN 114850)
Eve H. Cervantez (SBN 164709)
Rebekah B. Evenson (SBN 207825)
Danielle E. Leonard (SBN 218201)
Claire Prestel (SBN 235649)
ALTSHULER BERZON, LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

Kelly M. Dermody (SBN 171716)
Daniel E. Barenbaum (SBN 209261)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP 275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

John L. Burris (SBN 69888)
LAW OFFICES OF JOHN L. BURRIS
7677 Oak Port St., Suite 1120
Oakland, CA 94612
Telephone: (510) 839-5210
Facsimile: (510) 839-3882

Todd M. Schneider (SBN 158253)
Guy B. Wallace (SBN 176151)

SCHNEIDER & WALLACE
180 Montgomery Street, Suite 2000
San Francisco, CA 94104
Telephone: (415) 421-7100
Facsimile: (415) 421-7105

Michael S. Davis (SBN 160045)
LAW OFFICES OF MICHAEL S. DAVIS
345 Hill Street
San Francisco, CA 94109
Telephone: (415) 282-4315
Facsimile: (415) 358-5576

Kay McKenzie Parker (SBN 143140)
LAW OFFICES OF KAY MCKENZIE PARKER
225 Bush Street, 16th Floor
San Francisco, CA 94104
Telephone: (415) 227-9622
Facsimile: (415) 227-4522

Class Counsel

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 03-2659 SI; C 03-2878 SI

[Filed August 14, 2007]

DERRICK SATCHELL, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
FEDEX EXPRESS,	)
	)
Defendant.	)
	)

ORDER GRANTING FINAL APPROVAL TO CLASS ACTION SETTLEMENT AND CONSENT DECREE; CONFIRMING FINAL CERTIFICATION OF CLASSES

On August 9, 2007, the Court held a final fairness hearing to determine whether the Consent Decree should be given final approval. On April 13, 2007, the Court granted preliminary approval to the Consent Decree, and directed that notice of the settlement terms be provided to the class. After consideration of the Consent Decree, the papers submitted in support

of final approval, the response of the class to the settlement, and the proceedings in this action to date, the Court hereby GRANTS the motion for final approval (Docket No. 751) and orders as follows:

1. Except as otherwise specified in this order, the Court adopts all defined terms set forth in the Consent Decree, attached as Exhibit 1 to the April 13, 2007 order granting preliminary approval;

2. The Court confirms as final its conditional certification of the injunctive relief-classes and the monetary-relief Settlement Class, as defined in the Consent Decree and in Section III of the April 13, 2007 order, for purposes of settlement and based on the findings in Section III of the April 13, 2007 order and the absence of any objections from any class members to such certification.

3. The Court confirms as final the appointment of Derrick Satchell, Kalini Boykin, Valerie Brown, Rick Gonzales, Cynthia Guerrero, Rachel Hutchins, Tyrone Merritt, Kelvin Smith Sr., and Ken Stevenson as class representatives as stated in Section IV of the April 13, 2007 order.

4. The Court confirms as final the appointment of the following as Class Counsel: Altshuler Berzon LLP; Lieff, Cabraser, Heimann & Bernstein, LLP; Schneider & Wallace; Law Office of John Burris; Law Offices of Michael S. Davis; Law Offices of Kay McKenzie Parker; Law Offices of Waukeen Q. McCoy; and Barry Goldstein, of counsel to Goldstein, Demchak, Baller, Borden and Dardarian.

5. The Class Notice and Claim Form given to class members, pursuant to the Court's orders, constituted the best notice practicable under the circumstances, was accomplished in all material respects, and met the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution, and any other applicable law.

6. Pursuant to Federal Rule of Civil Procedure 23(e), the Court grants final approval to the Consent Decree and the settlement set forth therein. The Court finds that the Consent Decree and settlement are fair, reasonable and adequate in all respects. The Court specifically finds that the settlement is rationally related to the strength of plaintiffs' and class members' claims given the risk, expense, complexity and duration of further litigation. This Court also finds that the parties engaged in thorough factual and legal investigation, and that the Consent Decree is the result of arms-length negotiations between experienced counsel representing the interests of the parties. *See Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

7. The Court further finds that the response of the class to the settlement supports final approval. The deadline for postmarking claim forms was August 1, 2007, and of the 23,970 class members who received mailed notice, 10,582 submitted claim forms as of July 27, 2007. Only four class members submitted objections, and one of those, submitted by Maurice A. Smith, was untimely. The Court has reviewed and considered the objections submitted by Brett Hoiland, LaKeysha Dorsey, Rosalinda Olmos, and Maurice A. Smith, and finds that they do not raise concerns that

warrant rejecting the settlement. The Court hereby incorporates its discussion of the objections submitted by class members Hoiland and Olmos, as set forth in the Order Granting Plaintiffs' Motion for Approval of Service Payments. Ms. Dorsey's objection states that she believes that the "monetary relief being provided is not commensurate with the loss," and that she will "present new evidence through a lawyer at the final fairness hearing." Neither Ms. Dorsey nor anyone acting on her behalf appeared at the August 9, 2007 hearing. Mr. Smith also appears to object to the monetary relief, and his papers state that he "will settle for $1,140,000.00." The Court finds that these objections are not well-founded, and that the monetary relief provided to the class is considerable. The Court also finds that the mechanisms and procedures set forth in the Consent Decree by which payments are to be calculated and made to class members who have filed timely claims are fair, reasonable, and adequate. The Court also notes that Ms. Dorsey and Mr. Smith were free to exclude themselves from the monetary portion of the settlement and pursue their claims independently; neither chose to exercise that option.

8. The Court approves the parties' agreement to permit Herman Savage and Michelle Swallow to rescind their requests for exclusion, even though their rescission requests were submitted after the deadline for rescissions set forth in the Court's April 13, 2007 order.

9. The Court approves the parties' agreement to treat the requests for exclusion submitted by Nicholas Benavente, Eloisa Blandon, Hector Garcia, and Richard Zapata as effective, even though the requests

did not use the precise language required by the Court's April 13, 2007 order.

10. By operation of the entry of this Order and the Final Judgment, all released claims are fully, finally and forever released, relinquished and discharged, pursuant to the terms of the Consent Decree, as to all monetary-relief Settlement Class members other than those listed in Exhibit A to the Final Judgment. The Court has reviewed the release provision in the Consent Decree, and the Court finds the releases to be fair, reasonable, and enforceable under applicable law. All claims released pursuant to the Consent Decree are dismissed with prejudice as to all class members other than those listed in Exhibit A to the Final Judgment.

11. The Court retains jurisdiction over this matter for purposes of resolving issues relating to administration, implementation and enforcement of the Consent Decree.

IT IS SO ORDERED.

Dated: August 14, 2007

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

142

(2)

Supreme Court, U.S.
FILED
OCT 5 - 2009
OFFICE OF THE CLERK

No. 08-1500

In the Supreme Court of the United States

FEDERAL EXPRESS CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JAMES L. LEE
Deputy General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ANNE NOEL OCCHIALINO
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission (EEOC) plainly lacks authority to issue an administrative subpoena after the charging party has been issued a right-to-sue notice and joined a lawsuit encompassing his claims.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 6, 11
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 9
EEOC v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426 (9th Cir. 1983) 6, 7, 9
EEOC v. *Hearst Corp.*, 103 F 3d 462 (5th Cir. 1997) ... 7, 11
EEOC v. *Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975) 12, 13
EEOC v. *Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. 2001) 5, 8
EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) 2
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) 7, 11
Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501 (1943) 12
FTC v. *Ken Roberts Co.*, 276 F.3d 583 (D.C. Cir. 2001), cert. denied, 537 U.S. 820 (2002) 12
General Tel. Co. v. *EEOC*, 446 U.S. 318 (1980) 10
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) 2, 10
University of Pa. v. *EEOC*, 493 U.S. 182 (1990) 2, 11

Statutes, regulations and rules: Page

Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 1
42 U.S.C. 2000e-2 2
42 U.S.C. 2000e-3 2
42 U.S.C. 2000e-5(b) 2, 3
42 U.S.C. 2000e-5(f)(1) 3
42 U.S.C. 2000e-8(a) 2
42 U.S.C. 2000e-9 ..... 2, 3
29 C.F.R.:
Section 1601.7(a) 2
Section 1601.20 3
Section 1601.24(a) 3
Section 1601.27 3
Section 1601.28(a) 3
Section 1601.28(a)(3) 3, 5, 6, 13

Miscellaneous:

1 *EEOC Compliance Manual* (June 2006) 3, 13
EEOC, *All Statutes: FY 1997- FY 2008* (Mar. 11, 2009) <www.eeoc.gov/stats/all.html> 9, 10

In the Supreme Court of the United States

No. 08-1500

FEDERAL EXPRESS CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28a-55a) is reported at 543 F.3d 531. The amended opinion of the court of appeals (Pet. App. 1a-27a) is reported at 558 F.3d 842. The memorandum opinion and order of the district court (Pet. App. 56a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2009. The petition for a writ of certiorari was filed on June 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits various employment practices involving discrimination on the basis of "race, color, reli-

gion, sex, or national origin." 42 U.S.C. 2000e-2, 2000e-3. The Equal Employment Opportunity Commission (EEOC) is charged with "[p]rimary responsibility for enforcing Title VII." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984) (citing 42 U.S.C. 2000e-5(a)).

"Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination." *Shell Oil Co.*, 466 U.S. at 62 (quoting *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977)(*Occidental Life*)). That procedure begins with the filing of a charge of discrimination, either by an aggrieved individual or by a Commissioner of the EEOC. 42 U.S.C. 2000e-5(b); 29 C.F.R. 1601.7(a). When a charge is filed, "[t]he EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true." *Occidental Life*, 432 U.S. at 359; 42 U.S.C. 2000e-5(b) (EEOC "shall make an investigation thereof").

"To enable the Commission to make informed decisions at each stage of the enforcement process," Title VII "confers a broad right of access to relevant evidence[.]" *University of Pa.* v. *EEOC*, 493 U.S. 182, 191 (1990). The EEOC "is entitled to inspect and copy 'any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation.'" *Shell Oil Co.*, 466 U.S. at 63 (brackets in original) (quoting 42 U.S.C. 2000e-8(a)). In conducting such an investigation, the EEOC may issue administrative subpoenas and request judicial enforcement of those subpoenas. 42 U.S.C. 2000e-9; *Shell Oil Co.*, 466 U.S. at 63.

If the EEOC "determines after such investigation that there is reasonable cause to believe that the charge is true," it must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b); see 29 C.F.R. 1601.20, 1601.24(a). If such efforts fail, the EEOC may then bring a civil action against the employer, 42 U.S.C. 2000e-5(f)(1); 29 C.F.R. 1601.27, in which the charging party may intervene as a matter of right, 42 U.S.C. 2000e-5(f)(1). If the EEOC does not bring an enforcement action, the individual employee may request a right-to-sue notice and bring a civil suit against the employer directly. *Ibid.* (providing for issuance of a right-to-sue notice on dismissal of a charge or failure to resolve a charge by conciliation within 180 days). Courts may in their discretion permit the EEOC to intervene in the charging party's lawsuit. *Ibid.*

When the EEOC issues a right-to-sue notice, it generally terminates its processing of the charge. Regulations provide, however, that issuance of the right-to-sue notice does not end the EEOC's processing where an enumerated official of the Commission "determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge." 29 C.F.R. 1601.28(a)(3). The EEOC has interpreted that regulation to permit continued investigation as part of further "process[ing] [of] the charge." 1 *EEOC Compliance Manual* § 6.4 (June 2006) (*EEOC Manual*).

2. Tyrone Merritt, an African-American man, began working for petitioner on September 24, 1998, in an entry-level job. Gov't C.A. Br. 2. Merritt was denied consideration for a management position because he

failed the "Basic Skills Test" (BST), a cognitive ability examination that petitioner required its employees to pass in order to qualify for a promotion. *Ibid.*

On November 27, 2004, Merritt filed a charge of discrimination with the EEOC against petitioner on "behalf of himself and similarly situated African American and Latino employees" in FedEx's Western Region who have been "denied promotion opportunities, unfairly disciplined, and denied compensation" as a result of their race. Pet. App. 4a. The charge alleged that the BST had a statistically significant adverse impact on African-American and Latino employees. *Ibid.* Merritt also alleged that petitioner had denied him promotions given to similarly situated Caucasian employees and had disciplined him more harshly, discriminatorily denied him fair compensation due to racially biased disciplinary evaluation policies and practices, and had denied him leave without pay given to Caucasian employees. *Ibid.*

On October 20, 2005, while the EEOC was still investigating the charge, Merritt requested a right-to-sue letter, which the EEOC issued him. Pet. App. 4a. Consistent with governing regulations, the EEOC stated in the notice that it intended to continue processing Merritt's charge. *Ibid.* On October 26, 2005, Merritt joined an already pending class action lawsuit against petitioner, *Satchell* v. *Federal Express*, No. 3:03-cv-0259 (N.D. Cal.). Pet. App. 4a. The class members in the *Satchell* lawsuit included African-American and Latino employees of petitioner's Western Region, which encompasses 11 states, but excluded employees outside that region. *Ibid.* The claims in *Satchell* included race-based allegations of disparate treatment and disparate impact discrimination under Title VII as to promotions, com-

pensation, discipline, and petitioner's use of the BST. *Id.* at 127a-128a.

On February 10, 2006, the EEOC issued to petitioner a subpoena duces tecum as part of its continuing investigation. Pet. App. 5a. The subpoena required petitioner to provide basic information about computer files it had maintained since January 1, 2003, containing personnel data. *Ibid.* Petitioner objected to the subpoena and filed a petition to revoke, which the EEOC denied. *Ibid.*

3. After petitioner refused to comply with the subpoena, the EEOC filed an enforcement action in the United States District Court for the District of Arizona. Pet. App. 5a. Petitioner defended by arguing that the EEOC was divested of jurisdiction to investigate after it issued Merritt a right-to-sue notice and Merritt joined the *Satchell* litigation.[1] *Id.* at 59a.

The district court rejected petitioner's arguments, concluding that the subpoena should be enforced because the agency did not "plainly lack[]" jurisdiction to issue it. Pet. App. 63a (quoting *EEOC* v. *Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001)). In reaching that conclusion, the court noted that Title VII entitles the EEOC to broad access to any information relevant to allegations raised in a charge, Merritt's charges "raise[d] the specter of a nationwide pattern of race-based discrimination," the *Satchell* lawsuit was limited to employees in just 11 states, and the EEOC's own regulations permitted it to continue processing a charge after issuing a right-to-sue notice when doing so would "effectuate the purpose of Title VII." *Id.* at 59a-63a (quoting 29 C.F.R. 1601.28(a)(3)).

---

[1] Petitioner also argued that the subpoena was overly broad and sought irrelevant information. Petitioner does not renew those contentions in this Court. Pet. at 6 n.2.

4. The court of appeals unanimously affirmed.[2] Pet. App. 1a-27a. The court explained at the outset that its consideration of petitioner's challenge to the subpoena was limited by the applicable standard of review. An administrative subpoena should be enforced, the court noted, as long as "there is some plausible ground for jurisdiction, or, to phrase it another way, unless jurisdiction is plainly lacking." *Id.* at 11a (quoting *EEOC* v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1430 (9th Cir. 1983)) (internal quotation marks omitted).

Applying that standard, the court held that there was "at the very least, a plausible ground for jurisdiction." Pet. App. 16a (citation omitted). The court noted that under Title VII, governing regulations, and the EEOC's interpretation of those regulations, the EEOC has authority to continue investigating a charge after issuing a right-to-sue notice when a designated official "determines * * * that [such investigation] would effectuate the purpose of [T]itle VII or the ADA." *Id.* at 14a (quoting 29 C.F.R. 1601.28(a)(3)). The court of appeals observed that the EEOC had followed that course here, and it reasoned that there was "nothing to suggest that the EEOC exceeded its authority in doing so." *Id.* at 16a. The court also concluded that, under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), the EEOC's interpretation of its authority was controlling because it was "neither plainly erroneous nor inconsistent with" the applicable regulation. Pet. App. 15a n.2. The court therefore concluded that "the EEOC did not 'plainly lack' the au-

---

[2] While the appeal was pending, the *Satchell* lawsuit settled for nearly $55 million dollars and injunctive relief. Pet. App. 126a; see *id.* at 118a-163a, 164a-168a.

thority to issue the subpoena." *Id.* at 16a (quoting *Children's Hosp. Med. Ctr.*, 719 F.2d at 1430).

The court next observed that "[t]he Fifth Circuit is the only other circuit to have addressed the question of whether the EEOC's authority to issue an administrative subpoena ceases when the charging party files suit." Pet. App. 16a. The court acknowledged that, in *EEOC* v. *Hearst Corp.*, 103 F.3d 462 (1997), the Fifth Circuit had reached a contrary conclusion, but the court explained that it disagreed with *Hearst* for several reasons. As an initial matter, the court reasoned that *Hearst* failed to "review the administrative subpoena under the deferential standard" applicable to this type of challenge. Pet. App. 17a n.3. The court also explained that, contrary to the Fifth Circuit's reasoning, the stages of EEOC's enforcement process are not "distinct" and mutually exclusive; rather, "Title VII confers upon the EEOC investigatory authority during *each* stage." *Id.* at 17a-18a. In addition, the court concluded that "*Hearst*'s notion that the charging party" has the power to eliminate the EEOC's authority to investigate is inconsistent with this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002) (*Waffle House*), which stated that "once a charge is filed, . . . under the [] statute the EEOC is in command of the process" and is "master of its own case." Pet. App. 18a, 19a (quoting *Waffle House*, 534 U.S. at 291). And the court reasoned that *Hearst* both failed to address the EEOC regulation permitting continued investigation and departed from a "straightforward reading of Title VII," *id.* at 22a, which nowhere "indicates that the EEOC's investigatory powers over a charge cease when the charging party files a private action," *id.* at 20a.

The court of appeals then dismissed petitioner's argument that because, in petitioner's view, Title VII prohibits the EEOC from filing suit based upon a charge once the charging party has initiated an action, the EEOC necessarily lacks the authority to continue any investigation after that point. Pet. App. 22a. Although it deemed the premise of that argument "a dubious statement of the law," *ibid.*, the court explained that this case does not implicate the question of whether the EEOC may also sue after the charging party has done so. "That question," the court explained," "should be decided in a case where the EEOC actually brings a duplicative lawsuit, not in an action to enforce an administrative subpoena." *Ibid.* (quoting *Karuk Tribe Hous. Auth.*, 260 F.3d at 1078, for the proposition that it is inappropriate to resolve "potential defenses to enforcement actions" when reviewing the validity of an administrative subpoena). Accordingly, the court of appeals concluded that "whether the EEOC may be barred from bringing a subsequent lawsuit based upon the Merritt charge is simply irrelevant to whether the EEOC could issue an administrative subpoena based upon that charge." *Id.* at 23a.

ARGUMENT

1. Petitioner primarily contends (Pet. 6-23) that review is warranted to resolve a conflict among the courts of appeals concerning whether the EEOC may file an enforcement action after the charging party receives a right-to-sue notice and initiates his own suit. This case, which involves only a challenge to an administrative subpoena, does not implicate that question. As the court of appeals recognized, a "party may not defeat agency authority to investigate with a claim that could be a de-

fense if the agency subsequently decides to bring an action against it." Pet. App. 11a (quoting *EEOC* v. *Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1429 (9th Cir. 1983)). Accordingly, the court of appeals explicitly stated: "[W]e need not decide whether the EEOC has the authority to bring [its own] lawsuit. That question should be decided in a case where the EEOC actually brings a duplicative lawsuit, not in an action to enforce an administrative subpoena." Pet. App. 22a; see *id.* at 23a ("[W]e conclude that whether the EEOC may be barred from bringing a subsequent lawsuit based upon the Merritt charge is simply irrelevant to whether the EEOC could issue an administrative subpoena based upon that charge.").

Because the court of appeals did not address the question of whether the EEOC can bring a subsequent action based on claims raised in Merritt's charge, review of that claim would be inappropriate in this case. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Indeed, it is quite likely that this case will never present the question of whether the EEOC can sue based on Merritt's charge. Before filing an enforcement action, the EEOC must complete its investigation, determine whether there is reasonable cause to believe a violation occurred, attempt conciliation if cause is found, and then, if conciliation fails, decide whether to litigate. In the last fiscal year, the EEOC received 95,402 charges of discrimination and found reasonable cause as to just 3693 charges, or 4.6%. See EEOC, *All Statutes: FY 1997-1998* (Mar. 11, 2009) <www.eeoc.gov/stats/

all.html>. Out of those 3693 charges where the EEOC found reasonable cause, the EEOC successfully conciliated 1128, or 1.4%. *Ibid.* Although there were 2565 charges as to which the EEOC found reasonable cause but did not secure successful conciliation, the EEOC filed only 325 lawsuits last year. Therefore, the prospect that the EEOC would file a direct enforcement action, and that this case would actually present the question of whether the EEOC was allowed to do so despite the charging party's conduct, is speculative and remote. Any decision by this Court on that question would be advisory.

2. To the extent petitioner also directly challenges (Pet. 6-23) the court of appeals' conclusion that the EEOC does not "plainly lack[]" authority to issue an administrative subpoena in these circumstances, that issue does not independently warrant review. The decision below is correct, and although the Fifth Circuit reached a different conclusion more than a decade ago, the Fifth Circuit's decision is inconsistent with this Court's more recent cases. In addition, the issue does not arise with any significant frequency.

a. The court of appeals correctly concluded that the EEOC's investigative authority does not necessarily cease after the charging party receives a right-to-sue notice and files a civil action. "The EEOC exists to advance the public interest in preventing and remedying employment discrimination," *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 331 (1980); it "does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 368 (1977). "To enable the Commission to make informed decisions at each stage of the enforcement process," Congress granted the EEOC "a broad right of

access to relevant evidence." *University of Pa.* v. *EEOC*, 493 U.S. 182, 191 (1990). As the court of appeals explained, nothing in Title VII purports to divest the EEOC of its authority to process a charge once it issues a right-to-sue notice. Pet. App. 15a-16a. Nor is there any basis for invalidating the EEOC's interpretation of the governing regulations as permitting further investigation as part of continued processing of the claim. That interpretation is not "plainly erroneous or inconsistent with the regulation." See *Auer* v. *Robbins*, 519 U.S.452, 461 (1997). Moreover, any conclusion that the charging party may by his conduct eliminate the EEOC's jurisdiction to investigate is in considerable tension with this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002). In that case, this Court explained that Title VII "clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291. Thus, "[a]bsent textual support for a contrary view, it is the public agency's province * * * to determine whether public resources should be committed to the recovery of victim-specific relief." *Id.* at 291-292; see *id.* at 291 ("[O]nce a charge is filed, * * * under the statute * * * the EEOC is in command of the process."); *id.* at 297 ("We have recognized several situations in which the EEOC does not stand in the employee's shoes.").

b. Petitioner correctly observes that, in *EEOC* v. *Hearst Corp.*, 103 F.3d 462 (1997), the Fifth Circuit reached a different conclusion regarding the EEOC's authority to continue investigating after the charging party files suit. *Hearst*, however, does not create a conflict warranting this Court's review.

First, it is not clear that there remains a live split, because the Fifth Circuit might well reach a different outcome if it reconsidered the issue today. *Hearst* was decided on the basis of an incorrect, plenary standard of review. As the court below explained, challenges to an agency's authority to issue administrative subpoenas are reviewed under a deferential approach and must be rejected unless the agency "plainly lack[s]" jurisdiction. Pet. App. 17a & n.3; see, *e.g.*, *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) ("The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary [of Labor] in the discharge of her duties under the Act, and it was the duty of the District Court to order its production."); *FTC* v. *Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (reaffirming holding that "enforcement of an agency's investigatory subpoena will be denied only when there is 'a patent lack of jurisdiction' in an agency to regulate or to investigate"), cert. denied, 537 U.S. 820 (2002). *Hearst* did not apply that deferential standard. In addition, the reasoning in *Hearst* clashes with this Court's subsequent decision in *Waffle House*. See p. 11, *supra*. It is therefore possible that, if the Fifth Circuit were to address this question under the correct standard and in light of *Waffle House*, it would overrule its decision in *Hearst*, obviating any need for review by this Court.[3]

---

[3] Notably, *Hearst* was in tension with other Fifth Circuit rulings even when it was decided. In *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453 (1975), the charging party filed a Title VII action alleging racial discrimination after the EEOC completed its investigation and issued a right-to-sue notice. *Id.* at 454. When that action was dismissed, the EEOC filed its own Title VII action alleging racial discrimination "predicated on, but not limited to, the same charge."

Second, the issue on which petitioner seeks review rarely arises. Indeed, since the EEOC gained litigating authority 37 years ago in 1972, only two court of appeals cases—the decision below and *Hearst*—appear to have squarely addressed the question of whether the issuance of a right-to-sue notice and the filing of a suit by the charging party divest the EEOC of power to issue an administrative subpoena. Even at the district-court level, only a few decisions have engaged this question. That dearth of precedent is consistent with the fact, reflected in the EEOC's regulations and noted by the court of appeals, that the EEOC elects to continue processing a charge after issuing a right-to-sue notice only in the rare and exceptional case. See Pet. App. 14a-15a (discussing 29 C.F.R. 1601.28(a)(3), and 1 *EEOC Manual* § 6.4).

At the least, this Court would benefit from a fuller circuit-court treatment of this issue before addressing it. Thus, any conflict between the decision below and the

---

Ibid. The district court dismissed the action, but the Fifth Circuit reversed. In doing so, the Fifth Circuit recognized that an EEOC investigation may lead to evidence of Title VII violations that extend beyond the specific allegations in a charge. *Id.* at 455. If that happens, the court said, the EEOC has the authority to bring suit to enforce Title VII as to these newly discovered violations, regardless of whether a charging party has initiated a private action. *Id.* at 455-456. Although in *Huttig Sash* the EEOC's investigation had already been completed when the charging party sued, *Huttig Sash* is at odds with *Hearst* because *Hearst* holds that a charging party's suit cuts off any ongoing EEOC investigation, which is prerequisite to a finding of reasonable cause, which, in turn, is a prerequisite to conciliation and any EEOC enforcement action. Thus, except where the EEOC has already completed its investigation, *Hearst* effectively precludes what *Huttig Sash* explicitly allows—the initiation, after a charging party sues, of an EEOC lawsuit predicated on violations ascertained during the course of a reasonable investigation of a charge.

Fifth Circuit's ruling in *Hearst* does not warrant further review of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

JAMES L. LEE
Deputy General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ANNE NOEL OCCHIALINO
Attorney
Equal Employment Opportunity Commission

OCTOBER 2009

Supreme Court, U.S.
FILED
OCT 22 2009
OFFICE OF THE CLERK

(3)

No. 08-1500

In The Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

DAVID A. BILLIONS*
JEANA M. LITTRELL
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 HACKS CROSS ROAD
THIRD FLOOR, BUILDING B
MEMPHIS, TN 38125-8800
(901) 434-8533

* *Counsel of Record*

Counsel for Petitioner

October 22, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

A. Respondent Concedes the Ninth Circuit's Decision Represents an Unprecedented Expansion of EEOC Power. 1

B. The Fifth and Ninth Circuit Split on the Underlying Issue is Live and Substantial. . 3

C. Both Issues Presented in the Petition Necessitate Review. 4

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

EEOC v. Federal Express Corp.,
543 F.3d 531 (9th Cir. 2009) 2

EEOC v. Hearst Corp.,
103 F.3d 462 (5th Cir. 1997) 2, 3, 4

EEOC v. Huttig Sash & Door Co.,
511 F.2d 453 (5th Cir. 1975) 2

EEOC v. Ocean City Police Dept.,
820 F.2d 1378 (4th Cir. 1987) (en banc), *vacated on other grounds*, 486 U.S 1019 (1988) 4, 5

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 3

FEC v. Machinists Non-Partisan Political League,
655 F.2d 380 (D.C. Cir. 1981) 4

FTC v. Ken Roberts Co.,
276 F.3d 583 (D.C. Cir. 2001) 4

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 5

Occidental Life Ins. Co. of California v. EEOC,
432 U.S. 355 (1977) 5

United States v. Mendenhall,
446 U.S. 544 (1980) 5

United States v. Morton Salt Co.,
338 U.S. 632 (1950) 4

OTHER

Brief *Amici Curiae* of the EEAC and U.S. Chamber of Commerce, *EEOC v. Federal Express Corp.*, 543 F.3d 531 (9th Cir. 2009) (06-16864) 2

REPLY BRIEF FOR THE PETITIONER

A. Respondent Concedes the Ninth Circuit's Decision Represents an Unprecedented Expansion of EEOC Power.

Respondent concedes FedEx's central argument by failing to address it.[1] As demonstrated in the petition, the Ninth Circuit's decision empowering the EEOC to indefinitely revive or perpetuate the investigation of a charge, effectively gives the EEOC the very plenary powers Congress deliberately withheld in passing Title VII. Pet. 7-12 & 17-18. If the Ninth Circuit's decision is not reviewed and reversed, there will be fewer settlements of employment discrimination cases and increased litigation costs because the EEOC will be able to continue or revive the investigation of any charge even though the charging party has exercised its right to request the right-to-sue, has filed suit, and has entered into a court-approved consent decree that addresses all individual and class claims raised in the

---

[1] Respondent misconstrues the factual record by representing that "Merritt was denied consideration for a management position because he failed the Basic Skills Test (BST), . . ." Opp. 3-4. Passage of the BST however was never a prerequisite for promotion to management, but instead was necessary for selection to the hourly, non-management positions of courier, ramp transport driver, and customer service agent. Pet. App. 132a. The BST tested an employee's basic listening, sorting and map reading skills rather than his readiness for promotion to management. Merritt did not apply for a management position, nor did he allege in his charges that he was denied consideration for a management position because of his inability to pass the BST. R.11, Ex.'s 1 & 2.

charge.[2] *See* Brief *Amici Curiae* of the EEAC and U.S. Chamber of Commerce at 11-16, *EEOC v. Federal Express Corp.*, 543 F.3d 531 (9th Cir. 2009) (06-16864). Even after the EEOC decides to intervene in the charging party's lawsuit or file its own action, it may circumvent the court's discovery rulings by seeking the same information from the employer via administrative subpoena, which as demonstrated in the petition, affords the EEOC much greater latitude in obtaining information than what is permitted under the *Federal Rules of Civil Procedure*. Pet. 10-11.

This perhaps unintended yet clear consequence of the Ninth Circuit's decision, which respondent makes

---

[2] As evidenced by the EEOC's position in this case, the ramifications extend beyond the Ninth Circuit. The charge at issue in this case was filed by Merritt on behalf of himself and the employees of FedEx's Western Region, yet the EEOC is pursuing the investigation of Merritt's charge as a nationwide claim on behalf of employees outside FedEx's Western Region, beyond the states within the jurisdiction of the Ninth Circuit. Respondent contends that *Hearst* was "in tension" with the Fifth Circuit's earlier decision in *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975), which examined whether the EEOC should be allowed to bring suit when its investigation of a charge discloses illegal practices other than those listed in the charge. The Fifth Circuit concluded that "although the termination of the aggrieved person's suit does not cut off the EEOC's right to bring suit to end practices discovered through the investigation of the charge filed by that person, *the EEOC would be barred from filing suit on that particular charge* and on behalf of that [charging party]. *Res judicata would prevent such a suit.*" *Huttig Sash*, 511 F.2d at 456 (emphasis added). *Hearst* is not "in tension" with *Huttig Sash*. On the contrary, *Hearst* provides the mechanism, a Commissioner's charge, by which the EEOC can pursue the *Huttig Sash* holding. *EEOC v. Hearst Corp.*, 103 F.3d 462, 470 (5th Cir. 1997).

no effort to dispute in its opposition, has significant potential to disrupt the orderly and timely resolution of Title VII claims. For these reasons, the Court should review this issue.

B. The Fifth and Ninth Circuit Split on the Underlying Issue is Live and Substantial.

While conceding the Fifth Circuit in *Hearst* reached an entirely different conclusion than the Ninth Circuit in this case regarding the EEOC's authority to continue investigating after the charging party files suit, respondent attempts to minimize this split by citing the Ninth Circuit's incorrect conclusion that the Fifth Circuit based the *Hearst* decision on the wrong standard of review. Opp. 11-12.

The *Hearst* court, however, reviewed the subpoena using the same principles and reasoning embodied in the Ninth Circuit's "plainly lacks jurisdiction" standard. *Hearst* analyzed the jurisdictional issue under *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984) which recognized that "'the existence of a valid charge is a *jurisdictional* prerequisite to judicial enforcement of a subpoena issued by the EEOC.'" *Hearst*, 103 F.3d at 464 (citing *Shell Oil Co.*, 466 U.S. at 65) (emphasis added). Applying this standard, *Hearst* concluded it was obligated to determine as a threshold matter whether a Title VII charge upon which litigation had commenced could continue to provide a jurisdictional basis for an administrative investigation by the EEOC. *Id.* The court properly held that under the distinct and sequential enforcement provisions of Title VII, the EEOC no longer retains jurisdiction to investigate a charge once the charging party elects to file suit because the purpose of the investigation -- to

determine whether reasonable cause supports the allegations -- is no longer served. *Id.* at 469.

This initial determination of whether the agency has jurisdiction to issue an investigatory subpoena is the same analysis required under the standard of review urged by the Ninth Circuit. Generally, in a subpoena enforcement proceeding the court's role is sharply limited, *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1379 (4th Cir. 1987) (en banc); however this role is neither "minor nor ministerial," *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001), nor is the court "merely a rubber stamp" for enforcement. *Ocean City*, 820 F.2d at 1379. The court initially must "assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency," *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C. Cir. 1981), and may only enforce a subpoena where "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Thus, as an initial matter, the court must determine whether the agency has statutory jurisdiction to issue the subpoena, which is exactly what the court did in *Hearst*. As the Fifth and Ninth Circuits effectively reviewed the subpoenas at issue under the same standard, respondent's contention that a live split may not exist (Opp. 12), is without merit.

C. Both Issues Presented in the Petition Necessitate Review.

Respondent briefly argues that because the Ninth Circuit declined to decide whether the EEOC may

institute a direct action after the charging party sues, it would be inappropriate for this Court to review that question. Opp. 9. To the contrary, the Court should review this issue because a "determination of th[is] question is essential to the correct disposition of the other issue[] in the case, . . ." *United States v. Mendenhall*, 446 U.S. 544, 551-552, n. 5 (1980) (overruled on other grounds) (Court considered argument on merits of issue not presented in the petition or argued at the district or court of appeals because it was "fairly comprised" by questions set out in petition).

The purpose of the investigatory stage is to determine whether reasonable cause supports the claims, *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 359 (1977), in order to prepare the EEOC for action against the employer. *EEOC v. Ocean City Police Dept.*, 820 F.2d 1378, 1380 (4th Cir. 1987) *vacated on other grounds*, 486 U.S 1019 (1988). If the EEOC is precluded from pursuing an action on a particular charge, there is no statutory purpose for the investigation. The two issues presented in the petition are inextricably intertwined and because the second issue is "fairly included" in the first issue, review of both questions is appropriate and necessary. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995).

CONCLUSION

This case provides an important opportunity for the Court to resolve the conflicts among the Circuits regarding the EEOC's authority under Title VII to investigate and enforce charges of discrimination. Without guidance on these important federal

questions, the EEOC will retain perpetual jurisdiction to investigate and enforce a charge even after the charging party resolves all claims through litigation and the EEOC has foregone the opportunity to intervene.[3] This result not only exceeds the scope of Title VII but has significant potential to disrupt the timely and orderly resolution of future charges. For these reasons as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully Submitted,

David A. Billions*
Federal Express Corporation
Legal Department, Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8533

Jeana M. Littrell
Federal Express Corporation
Legal Department, Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8561

**Counsel of Record*
Counsel for Petitioner
Federal Express Corporation

---

[3] In opposition, respondent acknowledges through its silence that the Ninth Circuit's ruling empowers the EEOC to investigate a charge without any temporal limitation.